88-781

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MUNCIE POWER PRODUCTS, INC.,

Petitioner,

-vs.-

FRED CHURNOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is a case of actual controversy outside the scope of the Declaratory Judgment Act, 28 U.S.C. §2201, merely because it involves a "product liability" claim?

2. Can a federal court, without factual reasons or support, dismiss a properly filed Declaratory Judgment Act suit merely because it involves a "product liability" claim and the injured party has *later* filed a state court action?

3. Is the clearly erroneous and unsupported holding in 1969 by the Seventh Circuit in *Cunningham Brothers Inc.* v. *Bail* 407 F.2d 1165 (7th Cir. 1969) cert. denied 395 U.S. 959 (1969) apparently adopted, at least in part, by the Third Circuit in this case, now ripe for review in view of the national "product liability" crisis which has arisen since 1969?

PARTIES TO PROCEEDINGS BELOW

The petitioner in this action (and plaintiff-appellant below) is Muncie Power Products, Inc.

The respondent in this action (and the defendant-appellee below) is Fred Churnock.

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IN THE

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OCTOBER TERM, 1988

No. ___

MUNCIE POWER PRODUCTS, INC.,

Petitioner,

-vs.-

FRED CHURNOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Muncie Power Products, Inc.[1] (hereinafter, "Muncie") respectfully prays that a Writ of Certiorari issue to review the judgment entered in favor of respondent, Fred Churnock (hereinafter, "Churnock") by the United States Court of Appeals for the Third Circuit in the cause numbered 88-5268.

Opinions Below

The Judgment Order of the Court of Appeals for the Third Circuit is without accompanying opinion. It

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[1] The parties are as shown in the caption, except Muncie pursuant to an alleged contractual obligation, has made a demand on Vickers, Inc. to assume Muncie's defense of Churnock's claims against it.

is unreported and is reprinted in the Appendix to this Petition at App. A, p. 1a. The District Court's Opinion is unreported and is likewise reprinted in the Appendix to this Petition at App. B, p. 3a.

Jurisdiction

The Judgment Order of the Court of Appeals for the Third Circuit was entered on August 25, 1988. No petition for rehearing was filed, nor was any order sought or issued which granted, or would have granted, an extension for filing this Petition. This Petition for Writ of Certiorari was filed within ninety (90) days of the Judgment Order. Jurisdiction of this Court is invoked under 28 U.S.C. §1254.

Constitutional Provisions and Statutes Involved

This case involves the Declaratory Judgment Act, 28 U.S.C. §2201:

> **§2201. Creation of remedy**
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, Pub.L. 94-455, Title XIII, 5 1306(b)(8), 90 Stat. 1719; Nov. 6, 1978, Pub.L. 95-598, Title II, §249, 92 Stat. 2672.)

Statement of the Case

On February 15, 1986 Mr. Fred Churnock injured himself when he left his dump truck engine running and crawled under his truck to circumvent an inoperative control in the truck's cab by directly manipulating the power takeoff (PTO) device connected to the truck transmission. In doing so, he activated the rotatable shaft between the PTO and the hydraulic pump, whereupon his arm became entangled in the rotating shaft and was severely injured.

On October 30, 1987 a well known personal injury law firm in Churnock's home area (i.e. Wilkes-Barre/Scranton, Pa.) sent a letter via certified mail to Muncie Power Products, accusing Muncie of (1) manufacturing the PTO involved, (2) causing the accident, and (3) threatening "a products liability claim" (letter at App.C, p. 11a). Muncie received the letter on November 5, 1987.

Muncie, a small, closely-held Indiana corporation, knew that forensic evidence in a case such as this was extremely important if the true cause of the accident was to be assessed. Muncie also knew that the environment of a dump truck was a harsh one and there was a need to inspect the truck and *mounted* PTO promptly. Muncie further knew that the PTO was not necessarily manufactured by Muncie, and

could, despite bearing a "distributed by" Muncie label, actually have been manufactured by two larger corporations, Dana Corp. or Vickers, Inc.. Muncie promptly attempted investigation, but this proved less than successful.

To obtain speedy justice by way of access to the expeditious discovery procedures under the Federal Rules of Civil Procedure, as well as to secure Muncie's right to an impartial federal forum under diversity of citizenship principles (28 U.S.C. §1332), Muncie filed a Complaint for Declaratory Judgment pursuant to 28 U.S.C. §2201 on December 10, 1987 in Churnock's local federal court in Scranton, Pennsylvania[2] (App.D, p. 13a). Muncie followed this on January 21, 1988 with a discovery request to produce the accident parts (App. E, p. 19a) after earlier informal requests by Muncie to see the parts and the truck were refused.

On December 29, 1987 Churnock filed a Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim F.R.C.P. 12(b)(1) and (6) (App. F, p. 22a). The primary thrust of Churnock's motion was that "negligence" or product liability claims are exempt from the Declaratory Judgment Act since no case or controversy arises until the injured party, in such cases, brings suit. The principal authority cited was *Cunningham Brothers, Inc.* v. *Bail*, 407 F.2d 1165 (7th Cir. 1969), cert. denied 395 U.S. 959. (Brief p. 3). Churnock claimed no prejudice or inconvenience from having to be in his local federal court, rather than in his local state court. Indeed, it turns out, on

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[2] United States District Court for the Middle District of Pennsylvania.

information and belief, that Churnock and most, if not all, relevant witnesses reside closer to the federal court than the state court. . . . the difference, however, being insignificant since both courts are truly "local" to Churnock and the accident scenario.

On January 21, 1988 Muncie filed a Brief in opposition to Churnock's Motion to Dismiss (App. G, p. 41a), in addition to serving its formal Request to Produce. This Brief, pointing out the need for relief and that an actual controversy had arisen, was accompanied by an affidavit from Muncie's in-house engineering expert and Vice President, David M. Snyder, setting forth the severe potential for loss of forensic evidence if discovery was delayed (App. G, p. 61a).

On January 29, 1988 Churnock filed his Reply Brief reasserting that product liability cases were exempt from the Declaratory Judgment Act as set forth in *Cunningham Brothers Inc.*, supra (App. H, p. 67a). Once again, no prejudice or inconvenience at being in his local federal court was alleged by Churnock, nor has he alleged any to this date. . . since none exists.

On February 12, 1988 Churnock filed a Motion for Protective Order with Brief which, in short, refused to allow Muncie to inspect the alleged accident parts and truck, and sought to quash Muncie's Rule 34 F.R.C.P. request, supra, in this regard (App. I, p. 79a). The reasons given were (1) Churnock's pending Motion to Dismiss, (2) his announcement that on February 3, 1988 he had filed a "Praecipe for Summons", yet to be served on Muncie, which commenced the same action in Churnock's local state court[3], also join-

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[3] Court of Common Pleas of Luzerne County, Pa.

ing Voyton Brothers, the local truck distributor from whom Churnock had bought and had installed the equipment in question, and (3) that a mere inspection by Muncie of the accident parts would prejudice Voyton and inconvenience Churnock[4]. The Praecipe of Summons is found at App. I, p. 83a. It is not a complaint, and reveals nothing of the accident whatsoever.

Muncie opposed Churnock's Motion on February 25, 1988 pointing out expert Snyder's affidavit, and pleading with the Court to allow Muncie prompt, simple, non-destructive, visual inspection of the parts (App. J, p. 94a).

On February 29, 1988 the District Court (Honorable Judge Kosik) rendered its "MEMORANDUM" opinion, granting Churnock's Motion to Dismiss, thereby dismissing the case, and directing the Clerk of Court "to close this case" (App. B, p. 3a). The District Court ruled Churnock's Motion for Protective Order "moot" in view of this dismissal, thus preventing Muncie from being able to inspect the parts. The opinion of the District Court will be discussed infra since it is the opinion upon which the Third Circuit relied for its "one-line" Judgment Order affirmance.

Muncie filed a timely Notice of Appeal to the Third Circuit (App. K, p. 107a), and timely briefs were filed

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[4] The joinder of Voyton precluded Muncie from removing this later filed state case to the federal court, and joining it with Muncie's Declaratory Judgment action. Voyton could, of course, have just as easily been joined by Churnock as a third-party defendant under Rule 14 F.R.C.P. in Muncie's Declaratory Judgment action without defeating the diversity jurisdiction upon which it is based. In short, Churnock can have *all* rights resolved in Muncie's case.

by both parties, reasserting their respective positions[5]. Pursuant thereto, on August 17, 1988, the Court of Appeals for the Third Circuit conducted an oral hearing[6]. On August 15, 1988, two days prior to the oral hearing, and as brought out therein, Churnock filed his state court Complaint (App. L, p. 108a) in support of the Praecipe of Summons. The Complaint alleges that the cab control would not operate because a clamp under the truck at the linkage "had become loosened".

On August 25, 1988 the Court of Appeals for the Third Circuit issued a Judgment Order, without opinion, affirming the District Court (App. A, p. 1a).

On October 6, 1988 Muncie was finally able to inspect the truck (located in Wilkes-Barre, Pa.) and the PTO and controls (located in Allentown, Pa., at Lehigh University in plaintiff's expert's possession) which had previously been removed from the truck. It was then learned that Muncie was *not* the manufacturer of the PTO (Vickers was), but was the distributor thereof. The PTO parts shown to Muncie at

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[5] During the appellate process Churnock continued to refuse Muncie's counsel's informal requests for inspection of the parts, or even to read to Muncie's counsel the label on the parts so Muncie could determine who the real manufacturer was. At this time, Muncie was informed that the PTO and controls had been removed from the truck. Muncie's prior fear of loss of forensic evidence was confirmed.

[6] It is Muncie's understanding from a former law clerk of the Third Circuit that the Third Circuit grants oral hearings in about 5% or less of its cases, and that when oral hearing is granted, rarely, if ever, is a full opinion not rendered. The oral hearing in this case was a lively one, with numerous inquiries from the bench.

Lehigh University are *inconsistent* with Churnock's allegation in his state court Complaint that there exists a loosened clamp. Important forensic evidence has been lost through delay of justice.

Reasons for Granting the Writ

I. Summary

Rule 17 of this Court aptly and succinctly sets forth the reasons for granting this writ. The Court of Appeals for the Third Circuit in affirming the clearly erroneous and egregious decision of the District Court, has:

(1) ". . . .so far departed [by sanctioning the proceedings of the lower court] from the accepted and usual course of judicial proceedings. . . . as to call for an exercise of this Court's power of supervision", and

(2) has, in its departure, ". . . . decided an important question of federal law which has not been, but should be, settled by this Court. . .".

II. The Injustice That Has Occurred To Muncie Magnifies The National Importance Of This Case In An Era Of "Product Liability" Crisis

In the face of a severe and emotional injury, and with the law purposefully "tilted" against it on the premise that Muncie can afford product liability insurance, an accused manufacturer of a *safe* product, such as Muncie, is confronted with a difficult task under the best of circumstances, in defending against a claim that its product *caused* the injury. A jury is virtually always involved, yet the defense of a safe

product, and the true cause of the accident is often, of necessity, steeped in technology and complex forensic evidence. While the manufacturer may have product liability insurance at the time, it is almost never covered for punitive damages, and even a settlement of any magnitude can result in a loss of its insurance or a severe increase in already excessive premiums. Small to medium size companies[7] literally face the possibility of extinction from such suits.

To establish the true cause of the accident and to ensure a semblance of justice, speedy access to the alleged accident parts and an objective forum are essential[8]. Diversity of citizenship jurisdiction 28 U.S.C. §1332 historically and conventionally has been used by out-of-state defendants to seek the objective forum of a federal court in adjudicating product liability cases under the state law in which they reside. The procedures for discovery set forth in the Federal Rules of Civil Procedure Rules 26 et seq. have been drafted purposely to ensure speedy and complete justice. The Declaratory Judgment Act 28 U.S.C. §2201, as stated by the Court of Appeals for the Fourth Circuit in *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F.2d 321, 325 (4th Cir. 1940):

> ". . . . meets a real need and should be liberally construed to accomplish the purpose intended, i.e. to afford a speedy and inex-

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[7] Muncie is small, but has been a stalwart in the truck parts business for over half a century.

[8] It has been both Muncie's and the undersigned's experience that all too often plaintiffs and/or their counsel *do* not even present the true accident parts or name the proper manufacturer.

> pensive method of adjudicating legal disputes. . . ."

Indeed, the Third Circuit has itself stated in *Simmonds Aerocessories* v. *Elastic Stop Nut Corp.*, 257 F.2d 485, 489 (3rd Cir. 1958):

> "This court has emphasized that the Declaratory Judgment Act should have a liberal interpretation because it is remedial in character."

The egregiousness of the facts in this case highlight the injustice that the Third Circuit has sanctioned, against its own usual "liberal interpretation" and that of the Fourth Circuit. In short, an alleged injured party is now able to significantly enhance his chances of "winning" a lawsuit, after threatening another, who may well be totally innocent of any wrongdoing, by the following procedure:

(1) threaten the other party in writing to be sure any warranty provisions and "laches" defenses are eliminated,

(2) do not bring suit, but rather allow or cause important evidence to be destroyed that would have shown the innocence of the person accused, waiting to bring suit until just before the end of the statute of limitations,

(3) after the accused has properly and promptly filed a Declaratory Judgment Action in the accuser's local federal court, posing no prejudice or inconvenience to the injured accuser, further delay discov-

ery by moving to quash any attempt at it,

(4) then, after further delay, file his own action in a state court of his choosing where he perceives a less objective forum in his behalf exists, and join some local company as a defendant to prevent removal, and

(5) then, move for dismissal of the properly brought Declaratory Judgment Action with the assurance it will be dismissed because this is a "product liability" case.[9]

That is precisely the procedure the District Court ratified, what the Third Circuit has now sanctioned, and what *Cunningham Brothers Inc.*, supra, gave birth to, encourages and provides the support for with its unsupported finding that a "product liability" case is exempt from the speedy justice of the Declaratory Judgment Act.

Clearly, Rule 17.1(a) of this Court is fulfilled. Our nation is troubled enough without this injustice being thrust upon us in a burgeoning product liability crisis.

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[9] With regard to element (4), it is probative to ask: If a federal forum is, by definition, fair to both parties, why did Mr. Churnock go to the expense and trouble of filing the same action seven (7) weeks later in his local state court. . . . unless he perceived unfairness in his favor in this latter forum?

III. Even The District Court Did Not Fully Adopt The Clearly Erroneous Ruling Of The Seventh Circuit In Cunningham Bros. - But Its Partial Adoption Is Equally As Egregious And Raises A Very Important Federal Question That Cries Out For This Court's Resolution

The District Court's decision is actually in conflict with the Seventh Circuit's opinion in *Cunningham Brothers Inc., supra. In Cunningham Brothers* the Seventh Circuit, carte blanche, excluded product liability cases from the scope of the Declaratory Judgment Act. The gravamen of the District Court's opinion is found at App. B, p. 7a. The District Court states:

> "We believe that *Cunningham Brothers* is persuasive in the case sub judice. However, our holding is limited to the case where the injured party does not continually accuse the other to his detriment and the injured party files suit soon after the declaratory judgment action is filed."

While the two decisions conflict, and thus there is a conflict between the Third and Seventh Circuits, both are erroneous, since each holds that "product liability" cases are an exception to established Declaratory Judgment Act practice. What makes the District Court's opinion more onerous and confusing, is that it impliedly permits a Muncie to file its Declaratory Judgment Act case, and allows it to stand if "the injured party" does not file his own suit "soon after the declaratory judgment action is filed"; only to have it dismissed at the whim of the defendant if he does file his action "soon after".

Even more confusing is the criterion that "the injured party does not continually accuse the other to his detriment". What does that mean? How does anyone know when to bring a Declaratory Judgment Act suit under this criteria? Such a definition of an "actual controversy", i.e. requiring *continual* threats that must be to the accused's *detriment*, is directly contrary to this Court's definition in *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 464 (1937):

> "A 'controversy'. . . must be one that is appropriate for judicial determination. [cases omitted] A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. [cases omitted] The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."

There is no requirement for continual threats, just because someone has been injured in an accident. The Supreme Court places no limitations on the kind of case to which the Act is applicable. Indeed, the requirement for continual threats is directly in conflict with the Third Circuit's Opinion in *Simmonds Aerocessories*, supra:

> "It has been held. . . . that it is not essential that there be a direct threat of litigation in order to invoke the Declaratory Judgment Act. It is sufficient if such *a threat* is implicit in the attitude of the defendant as expressed in circumspect language contained in *a letter*. . ."
>
> (257 F.2d at 490, underlining added)

Clearly, there exists in this technological age, where the United States is fighting for its economic survival with its one great ability. . . . technical innovation and development of new products and new ideas, all bearing some risk of harm. . . . an important need to resolve this question of the scope of the Declaratory Judgment Act.

IV. The Legislative History Forms No Support For What The Seventh And Third Circuits Have Sanctioned

Cunningham Brothers, supra, is utterly unsupported in the legislative history of the Declaratory Judgment Act. Nowhere does the Act or its history single out negligence, personal injury, or by their modern name "product liability" cases, as an exception to its scope. Nowhere, furthermore, does the Act or its legislative history suggest or condone the criteria for invoking the Act required by the District Court.

One simple reference to this legislative history should suffice for the purposes of this Petition. In 1928, in discussing the need for the Act before the Senate Subcommittee on the Judiciary, the noted Yale Law School Professor Edwin M. Borchard, as one of the men most responsible, perhaps, for the enactment of the Act, quoted from the case of *Earl of Mansfield* v. *Stewart*, 5 Bell 139, 160 (1846) in which the British advocate bemoaned the lack of such an Act, then in existence in Scotland:

> "I can not close my observation in this case without once more expressing my great envy as an English lawyer, of the Scotch jurisprudence, and of those who enjoy under it

> the security and the various facilities and conveniences which they have from that most beneficial and most admirably contrived form of proceeding called a declaratory action. Here you must wait till a party choses to bring you into court: *here you must wait till possibly your evidence is gone*: here you have no means whatever, in ninety nine cases out of a hundred of obtaining the great benefit of this proceeding."
>
> (underlining added for emphasis)

Presumably, Congress saw the wisdom in having such an Act here in the United States. The District Court and the Seventh Circuit should not now be allowed to legislate it out of existence.

Conclusion

For the reasons stated above, Petitioner prays this Court to grant certiorari in this most important national matter.

Respectfully submitted

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-5268

MUNCIE POWER PRODUCTS, INC.

Appellant

vs.

CHURNOCK, FRED

On Appeal from the United States District Court
For the Middle District of Pennsylvania (Scranton)
(Civil Action No. 87-1735)
District Judge: Honorable Edwin M. Kosik

Argued August 17, 1988

BEFORE: STAPLETON and MANSMANN, *Circuit Judges*, and FISHER, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

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*Honorable Clarkson S. Fisher, United States District Judge for the District of New Jersey, sitting by designation.

By the Court,

/s/Walter K. Stapleton
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: AUG 25 1988

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 87-1735
(Judge Kosik)

MUNCIE POWER PRODUCTS, INC.

Plaintiff

vs.

FRED CHURNOCK

Defendant

Filed FEB 29 1988

MEMORANDUM

The plaintiff, Muncie Power Products, Inc. [hereinafter "Muncie"], filed this action on December 10, 1987 seeking a declaratory judgment against the defendant, Fred Churnock, pursuant to 28 U.S.C. §2201. Jurisdiction of this court is invoked under 28 U.S.C. §1332(a) (1).[1] On December 29, 1987, the defendant filed a motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b) (1) and (6). The defendant's motion has been briefed by the parties and is now ripe for disposition.

---

[1] Plaintiff Muncie is a corporation organized under the laws of Indiana and has its principal place of business in Indiana. Defendant Churnock is a resident of Pennsylvania.

The relevant facts of this case are as follows:[2]

On October 30, 1987, counsel for defendant informed the plaintiff by letter that he considered the plaintiff responsible for a February 15, 1986 injury suffered by the defendant, namely an arm amputation.[3] The letter stated that the defendant's injury was caused by a power take-off machine which was manufactured by plaintiff. The plaintiff claims that it is not responsible for the defendant's accident and that it is not liable to the defendant for his injuries. Thus, in this case, the plaintiff, a potential products liability defendant, seeks a declaration of non-liability for any injuries suffered by the defendant, a potential products liability plaintiff, from the February 15, 1986 accident. When the present action was filed, Churnock had not yet instituted a suit against Muncie.

In his motion to dismiss, the defendant claims that this action should be dismissed for lack of subject matter jurisdiction because there is no actual justiciable controversy. Specifically, the defendant's motion states that this declaratory judgment action filed by a potential tort defendant, namely Muncie, against the potential plaintiff, namely Churnock, presents no viable controversy because Churnock has not yet instituted a personal injury claim against Muncie. Stated simply, the defendant maintains that there is presently not any controversy between himself and Muncie and thus subject matter jurisdiction is lacking in the instant case. Additionally, the defendant states that if in fact he does file a personal injury claim against Muncie sometime in the future, Muncie can raise any defenses to liability that it may have at that time.

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[2] For purposes of the present motion, the plaintiff's allegations will be accepted as true. *See Hishon v. King & Spalding*, 467 U. S. 69 (1984).

[3] A copy of the October 30, 1987 letter is marked as exhibit "A" and is attached to the complaint, Doc. 1.

Plaintiff Muncie, in response to the defendant's motion to dismiss, argues that based upon the aforementioned October 30, 1987 letter an actual controversy exists in the present case. Thus, plaintiff claims that its declaratory judgment action is properly before this court. The plaintiff also contends that in the interests of judicial economy, the preservation of evidence and impartiality, its action should not be dismissed. Therefore, according to plaintiff Muncie, the question which we must address in this case is whether or not the written threat of suit by a potential plaintiff creates an actual controversy so as to allow the potential tort defendant to file a declaratory judgment action which seeks to obtain a declaration on non-liability.

In his reply brief, the defendant does not address the above stated issue raised by the plaintiff. Rather, the defendant maintains that the Declaratory Judgment Act was not intended to enable a prospective negligence action defendant to obtain a declaration of non-liability

The Declaratory Judgment Act provides in relevant part that:

> (a) In a case of actual controversy within its jurisdiction, . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
> 28 U.S.C. §2201(a).

It is well established that declaratory relief is not a matter of right but is directed to the sound discretion of the court. *Globe Indemnity Co. v. St. Paul Fire & Marine Ins. Co.*, 369 F.2d 102, 105 (3d Cir. 1966).

As stated above, when this case was filed, Churnock had not commenced any action against Muncie. However,

on February 3, 1988, after the motion to dismiss and briefs were submitted, Churnock instituted a products liability suit against Muncie arising out of the February 15, 1986 accident in the Court of Common Pleas of Luzerne County.[4] Neither party has made a request to supplement their respective briefs in light of the action filed by Churnock. Where, as here, the declaratory judgment action is filed in anticipation of a products liability suit, the products liability suit should proceed, even if filed seven [7] weeks later.

In support of his motion to dismiss, the plaintiff relies heavily upon *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969), *cert. denied*, 395 U. S. 959 (1969). In *Cunningham Brothers*, the plaintiff, a general contractor, hired the defendant subcontractor to do a portion of a job. Some of the employees of the defendant subcontractor, who were also named as defendants, were injured while working on the job. The plaintiff general contractor filed a declaratory judgment action against the subcontractor and its injured employees seeking a declaration that it was not in charge of the work being performed by the subcontractor's employees when they were injured. The general contractor also sought a declaration that the subcontractor's employees had no cause of action against it and that the subcontractor would have been liable to indemnify it if a judgment was recovered against it. The District court dismissed the general contractor's complaint and the Court of Appeals affirmed.

The court in *Cunningham Brothers*, supra, 407 F.2d at 1167, stated that "to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tortfeasor would be a perversion of the Declaratory Judgment Act." In *Cunningham Brothers*, the central issue raised in the general contractor's dec-

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[4] *See* ¶3 to Churnock's motion for a protective order and Exhibit "A" attached thereto, Doc. 9.

laratory judgment action was whether or not the general contractor was negligent. The court stated that if it allowed such a declaratory judgment action, in effect it would be allowing a substitute for the traditional procedures for adjudicating negligence cases. *Id.* at 1168. Thus, the *Cunningham Brothers* Court concluded that "it is not one of the purposes of the declaratory judgment acts to enable a prospective negligence action defendant to obtain a declaration of non-liability." [Citations omitted]. *Id.* The Court further held that the general contractor's action was inappropriate for declaratory relief because it may force the injured party to litigate a claim at an inconvenient time and in an inconvenient forum. *Id.* at 1169. We believe that *Cunningham Brothers* is persuasive in the case sub judice. However, our holding is limited to the case where the injured party does not continually accuse the other to his detriment and the injured party files suit soon after the declaratory judgment action is filed.

The instant case involves a products liability suit. Traditionally, in such cases, the party injured by a product initiates an action against the maker of the product. If we were to permit the present declaratory judgment action to proceed, we would be allowing a substitute for the traditional procedures for adjudicating product liability cases. In the case at bar, we do not believe that Muncie's declaratory judgment action against Churnock should be allowed to proceed. This is especially true under the present facts where the potential plaintiff only sent one [1] threatening letter to the potential defendant and filed suit against the potential defendant a short time after the declaratory judgment action was filed. The more effective procedure in products liability cases is the traditional approach, namely the injured party files suit against the manufacturer. Following the traditional approach protects the right of the personal injury plaintiff to choose the forum and the time, if at all, to assert his claim. Thus, we find that the present action is not in the best interest

of justice. Additionally, as noted, Churnock has filed a state action against Muncie. Therefore, the dismissal of the instant action will not prejudice Muncie's concerns over the loss of evidence and the expeditious inspection of the machine parts alleged to have caused the accident in question. Also, we believe that the question of Muncie's liability to Churnock will be better settled in the traditional approach, namely Churnock's suit against Muncie, rather than in a declaratory judgment action. Furthermore, allowing the present declaratory judgment action to proceed would be encouraging a "first to file" rule. Such a rule is not adhered to by the courts and we decline to adopt such a rule here. *See Crosley Corp. v. Westinghouse Electric & Manufacturing Co.*, 130 F.2d 474 (3d Cir. 1942), *cert. denied*, 317 U. S. 681 (1942). *See also Tampco Elec. Heater Corp. v. Omega Engineering*, 819 F.2d 746, 750 (7th Cir. 1987). Thus, we hold that a declaratory judgment in this case would serve no useful purpose.

The plaintiff has not cited a single authority which held that a declaratory judgment action is appropriate to allow a potential products liability defendant to obtain a declaration of non-liability. The plaintiff does, however, argue that *Cunningham Brothers* is distinguishable from the case at bar because unlike the case at bar, *Cunningham Brothers* did not involve a prior threat of suit. Once again, the plaintiff contends that the defendant's October 30, 1987 letter gave rise to an actual controversy which authorizes the present declaratory judgment action. We see no need to address the plaintiff's contention since, as stated, an actual case did in fact arise between the present parties when Churnock filed his state action against Muncie. As discussed above, we find that declaratory relief is inappropriate in the present case.

Moreover, as argued by the plaintiff, we recognize that non-liability may be declared in appropriate declaratory judgment actions. *Cunningham Brothers*, supra, 407 F.2d at 1168, note 2. [Citation omitted]. However, we agree

with the defendant that declaratory judgment actions are appropriate in cases involving the interpretation of liability insurance, *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227 (1937), or cases involving the validity of a patent, *Creamery Package Mfg. Co. v. Cherry-Burrell Corp.*, 115 F.2d 980 (3d Cir. 1940), but not in cases like the present action.

Finally, on February 12, 1988 defendant Churnock filed a motion for a protective order pursuant to Fed. R. Civ. P. 26(c). In his motion, Churnock seeks to preclude Muncie from examining certain items that are listed in its request for production that was filed in this case. Since we are dismissing Muncie's declaratory judgment action, we see no need to address Churnock's motion for a protective order. Thus, Churnock's motion will be deemed as moot.

Based upon the foregoing, we shall grant defendant Churnock's motion to dismiss. An appropriate Order will issue.

ORDER

NOW, this 26 day of February, 1988, IT IS HEREBY ORDERED THAT:

[1] defendant Churnock's motion to dismiss the complaint is granted;

[2] defendant Churnock's motion for a protective order is deemed as moot; and

[3] the Clerk of Court is directed to close this case.

/s/ Edwin M. Kosik
Edwin M. Kosik
United States District Judge

APPENDIX C

HOURIGAN, KLUGER, SPOHRER & QUINN
A PROFESSIONAL CORPORATION

LAW OFFICES
SUITE SEVEN HUNDRED
UNITED PENN BANK BUILDING
WILKES-BARRE, PENNA. 18701

(717) 825-9401
TELECOPIER (717) 829-3460

Direct Dial: (717) 825-2719

October 30, 1987

Muncy Power Products
32 North Pershing Drive
Muncy, Indiana 47305

RE: Fred Churnock
Our File No: 26355-001

Dear Sirs:

Please be advised that my office has been retained to represent Fred Churnock who received very serious personal injuries as the result of a power take-off manufactured by you. The date of the accident was February 15, 1986.

I would appreciate your turning this letter over to your insurance carrier with instructions that they contact the undersigned. The nature of the case is a products liability claim. My client had his arm amputated as the result of a power take-off manufactured by you and sold to Voyton Brothers Truck Body Manufacturing Co. at Parrish and High Streets, Wilkes-Barre, PA. I have also placed Voyton Brothers on notice of this suit.

I thank you in advance for your immediate attention to this request.

With kind regards,
/s/ William F. Anzalone
William F. Anzalone

WFA:rar
cc: Fred Churnock

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Received Muncie Power Products Nov 5, 1987

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. CV-87-1735

MUNCIE POWER PRODUCTS, INC.
342 North Pershing Drive
Muncie, Indiana 47302
A corporation organized under
the laws of the State of Indiana

Plaintiff,

vs.

FRED CHURNOCK
A resident of the State
of Pennsylvania, residing
within the Middle District
of the State of Pennsylvania

Defendant.

FILED
DEC 10 1987

COMPLAINT FOR DECLARATORY JUDGMENT (PRODUCT LIABILITY - DIVERSITY OF CITIZENSHIP)

1. Plaintiff, Muncie Power Products, Inc., (i.e. hereinafter "Muncie") is a corporation organized under the laws of the State of Indiana with its principal place of business at 342 North Pershing Drive, Muncie, Indiana 47302.

2. On information and belief, Defendant, Fred Churnock, is a private individual residing in the State of Penn-

sylvania, within the United States Federal Middle District for Pennsylvania.

JURISDICTION

3. This Court has jurisdiction over this action under the federal Declaratory Judgments Act, 28 U.S.C. §2201, and pursuant to diversity of citizenship, under 28 U.S.C. §1332, since the amount in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between citizens of different states.

4. This Court has personal jurisdiction over the Defendant, since, based upon information and belief, he resides within the jurisdiction of this Court.

CAUSE OF ACTION

5. Defendant, via his attorney, William F. Anzalone, of the law firm of Hourigan, Kluger, Spohrer & Quinn, having its law offices at least at Suite 700, United Penn Bank Building, Wilkes-Barre, Pennsylvania 18701, has informed Muncie, in writing, by letter dated October 30, 1987 (a copy of which is attached hereto as Exhibit A) that Defendant considers Muncie to have been responsible for, at least in part, a very serious personal injury to Defendant caused, at least in part, and resulting from a power take-off manufactured by Muncie. The particular injury alleged is in the nature of an arm amputation and the nature of the specific cause of action alleged is "a products liability claim".

6. Defendant in this writing, by claiming that Muncie is responsible for the aforesaid injuries to Defendant, has thus and thereby threatened Plaintiff with a "products liability claim" which monetary relief will exceed $10,000, arising out of the alleged personal injury occurring by way of accident on February 15, 1986.

7. On information and belief the sums claimed in damage by the Defendant exceed $10,000 in or value, exclusive of interest and costs.

8. Plaintiff Muncie denies and affirmatively states that it is not responsible in any way for the aforesaid accident, nor is it liable in any way to Defendant for the injuries resulting to the Defendant from his aforesaid accident. Plaintiff Muncie further denies responsibility to the Defendant, and affirmatively asserts that it is not responsible to the Defendant in any amount for any damages arising out of the aforesaid injury, contrary to the threats in writing made by Defendant in his letter of October 30, 1987.

9. Plaintiff Muncie further asserts that it has not engaged in any unlawful acts or behavior, the proximate cause of which resulted in any "products liability claim" that could be made against Plaintiff Muncie by Defendant.

10. Plaintiff is in doubts as to its legal rights and business position, which doubts have arisen due to the threats made by Defendant against Plaintiff in his aforesaid letter of October 30, 1987.

11. An actual and justiciable controversy exists between Plaintiff and Defendant with respect to the aforementioned injury, damages arising therefrom, and issues raised in regard thereto by the threats, in writing, in accordance with the letter of October 30, 1987, as aforementioned by the Defendant.

WHEREFORE, Plaintiff prays:

A. That all of the claims, threats, anmd accusations of the Defendant be declared invalid and void, and result in a no-cause against the Plaintiff.

B. That this Court declare that Plaintiff Muncie is not responsible for any damages or injuries arising out of the aforementioned alleged accident to Defendant.

C. That the Defendant be enjoined forthwith, both temporarily and permanently, from making any further threats, accusations or other allegations against Plaintiff Muncie in regard to the above.

D. For any further, necessary, and proper relief as authorized by 28 U.S.C. §2202.

E. For any such other relief as this Court finds proper and just.

Respectfully submitted,

/s/ Harry P. Mattern,
Harry P. Mattern, Esq.
(Supreme Court I.D. #2141
FARRELL, FRANK
&MATTERN
1021 United Penn Bank Building
Wilkes-Barre, Pennsylvania 18701
(717) 822-5643

OF COUNSEL:

Geoffrey R. Myers, Esq.
HALL, MYERS & ROSE
200 Semmes Building
10220 River Road
Potomac, Maryland 20854
(301) 365-8000

Dated: 12/10/87

EXHIBIT A

HOURIGAN, KOUGER, SOPHRER & QUINN
A PROFESSIONAL CORPORATION

LAW OFFICES
SUITE SEVEN HUNDRED
UNITED PENN BANK BUILDING
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October 30, 1987

Muncy Power Products
32 North Pershing Drive
Muncy, Indiana 47305

RE: Fred Churnock
Our File No: 26355-001

Dear Sirs:

Please be advised that my office has been retained to represent Fred Churnock who received very serious personal injuries as the result of a power take-off manufactured by you. The date of the accident was February 15, 1986.

I would appreciate your turning this letter over to your insurance carrier with instructions that they contact the undersigned. The nature of the case is a products liability claim. My client had his arm amputated as the result of a power take-off manufactured by you and sold to Voyton Brothers Truck Body Manufacturing Co. at Parrish and High Streets, Wilkes-Barre, PA. I have also placed Voyton Brothers on notice of this suit.

I thank you in advance for your immediate attention to this request.

With kind regards,

/s/ William F. Anzalone
William F. Anzalone

WFA:rar
cc: Fred Churnock

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Received Muncie Power Products NOV-5 1987

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A Corporation organized under
the Laws of the State of Indiana,

Plaintiff

vs.

FRED CHURNOCK, A resident of
the State of Pennsylvania,
residing within the Middle
District of the State of
Pennsylvania,

Defendant

FILED
JAN 21 1988

REQUEST FOR PRODUCTION OF ITEMS AND THINGS PURSUANT TO RULE 34

1. Plaintiff, Muncie Power Products, Inc. does request Defendant, Fred Churnock, to produce the following items and things and to permit plaintiff to inspect, test, examine and photograph these items and things as follows:

a. The truck alleged to have been involved in the alleged accident.

b. The power take-off device.

c. The controls for the power take-off device.

d. The shaft running to the power take-off device.

e. The hydraulic pump.

f. Controls for the hydraulic pump and all other parts alleged to be involved in the accident.

2. The plaintiff requests the defendant to produce the aforementioned at the residence of the plaintiff's counsel which is 235 Sahara Drive, Kingston, Pennsylvania 18704 or at such other place or location as is mutually agreeable to the parties.

3. The plaintiff requests the defendant to produce the aforementioned items and things on February 15, 1988 at 10:00 A.M. or at an earlier time if defendant's counsel will permit.

/s/ HARRY P. MATTERN
HARRY P. MATTERN, Esquire
Attorney for Plaintiff
1021 United Penn Bank Building
Wilkes-Barre, PA 18701
(717) 822-5643
ID # 21415

DATED: January 14, 1988

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A Corporation organized under
the Laws of the State of Indiana,

Plaintiff

vs.

FRED CHURNOCK, A resident of
the State of Pennsylvania,
residing within the Middle
District of the State of
Pennsylvania,

Defendant

CERTIFICATION OF SERVICE

I, HARRY P. MATTERN, Esquire, do hereby certify that I have this date, January 14, 1988, handcarried to the office of William F. Anzalone, Esquire 700 United Penn Bank Building, Wilkes-Barre, PA 18701, a Request for Production of Items and Things Pursuant to Rule 34.

/s/ HARRY P. MATTERN
HARRY P. MATTERN, Esquire
Attorney for Plaintiff

APPENDIX F

HOURIGAN, KLUGER, SPOHRER & QUINN
A PROFESSIONAL CORPORATION

BY: William F. Anzalone, Esq. Attorney for Defendant

IDENTIFICATION NO. 25681

LAW OFFICES
SUITE SEVEN HUNDRED
UNITED PENN BANK BUILDING
WILKES-BARRE, PENNA. 18701
(717) 825-9401

FILED
DEC 29 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A corporation organized under the
Laws of the State of Indiana

Plaintiff

Vs.

FRED CHURNOCK
A resident of the State of
Pennsylvania, residing within the
Middle District of the State of
Pennsylvania

Defendant

MOTION OF DEFENDANT TO DISMISS FOR LACK OF JURISDICTION OF THE COURT OVER THE SUBJECT MATTER AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO F.R.C.P. 12(b)(1) and (6)

The Defendant, FRED CHURNOCK, by and through his counsel, Hourigan, Kluger, Spohrer & Quinn, P.C., hereby move this Honorable Court as follows:

1. The Plaintiff, MUNCIE POWER PRODUCTS, INC., filed an action in the nature of a Declaratory Judgment Action on or about December 10, 1987 in the United States District Court for the Middle District of Pennsylvania.

2. That the Complaint filed by the Plaintiff for Declaratory relief should be dismissed by the Court for lack of jurisdiction over the subject matter since there is no actual justiciable controversy.

3. That the Complaint of the Plaintiff for declaratory relief should be dismissed by this Honorable Court for failure of the Plaintiff to state a claim upon which relief can be granted.

WHEREFORE, the Plaintiff moves this Honorable Court to dismiss the Complaint for Declaratory Judgment on the basis that there exists no actual justiciable controversy and the Court therefore lacks jurisdiction over the subject matter, and further, that the Plaintiff's Complaint fails to state a claim upon which relief can be granted.

HOURIGAN, KLUGER, SPOHRER & QUINN, P.C.

/s/ William L. Anzalone
William F. Anzalone, Esquire
Attorney for Defendant

CERTIFICATE OF SERVICE

WILLIAM F. ANZALONE, ESQUIRE, hereby certifies that he, as counsel for Defendant, has forwarded a true and correct copy of the foregoing Motion of Defendant to Dismiss for lack of Jurisdiction of the Court over the Subject Matter and for Failure to State a Claim upon which Relief can be Granted Pursuant to F.R.C.P. 12(b) (1) and (6) to the following:

Harry P. Mattern, Esquire
1021 United Penn Bank Bldg.
Wilkes-Barre, PA 18701

by first class mail, postage prepaid, this 29th day of December, 1987.

HOURIGAN, KLUGER, SPOHRER
& QUINN, P.C.

/s/William L. Anzalone
William F. Anzalone, Esquire
Attorney for Defendant

HOURIGAN, KLUGER, SPOHRER & QUINN
A PROFESSIONAL CORPORATION
700 UNITED PENN BANK BUILDING
WILKES-BARRE, PENNSYLVANIA 18701
(717) 825-9401

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A corporation organized under the
Laws of the State of Indiana

Plaintiff

Vs.

FRED CHURNOCK,
A resident of the State of Pennsylvania, residing within the Middle District of the State of Pennsylvania

Defendant

ORDER

AND NOW, this _____day of _____, 1987, upon consideration of the attached Motion the Complaint for Declaratory Judgment is dismissed.

BY THE COURT:

/s/ _____
J.

HOURIGAN, KLUGER, SPOHRER & QUINN
A PROFESSIONAL CORPORATION

BY: William F. Anzalone, Esq. Attorney for Defendant

IDENTIFICATION NO. 25681

LAW OFFICES
SUITE SEVEN HUNDRED
UNITED PENN BANK BUILDING
WILKES-BARRE, PENNA. 1'8701
(717) 825-9401

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A Corporation organized under the
Laws of the State of Indiana

Plaintiff

vs.

FRED CHURNOCK,
A resident of the State of
Pennsylvania, residing within the
Middle District of the State of
Pennsylvania,

Defendant

BRIEF OF DEFENDANT, FRED CHURNOCK, IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

I. HISTORY OF CASE

The Plaintiff, MUNCIE POWER PRODUCTS, INC., filed an action in the nature of a Declaratory Judgment Action on or about December 10, 1987, in the United States District Court for the Middle District of Pennsylvania. The instant Declaratory Judgment action filed on behalf of the Plaintiff, MUNCIE POWER PRODUCTS, INC., presupposes and precedes any potential claims and pleadings related thereto which may arise in the future concerning the above named parties, namely, MUNCIE POWER PRODUCTS, INC., and FRED CHURNOCK.

II. STATEMENT OF FACTS

The instant Declaratory Judgment Action filed on behalf of the Plaintiff, MUNCIE POWER PRODUCTS, INC., arises from the occurrence of an accident on February 15, 1986, in which the Defendant FRED CHURNOCK, received serious personal injuries. More specifically, on February 15, 1986, the Defendant, FRED CHURNOCK, suffered serious personal injuries as the result of a power take-off machine. The manufacturer of this particular power take-off machine has been identified as the Plaintiff, MUNCIE POWER PRODUCTS, INC.

III. STATEMENT OF QUESTIONS INVOLVED

A. *Whether An Action For Declaratory Judgment Which Arises From Personal Injuries Suffered By A "Potential" Plaintiff Which Is Filed Prior To The Institution Of Any Personal Injury Claim And Pleadings Related Thereto, And Which Is Filed On Behalf Of A "Potential" Defendant In The Underlying Personal Injury Claim Is Appropriate?*

(Answered In The Negative)

B. Whether The Instant For Declaratory *Judgment Which Arises From Personal Injuries Suffered By A Potential Plaintiff, Fred Churnock, Which Is Filed Prior To The Institution Of Any Claim And Pleadings Related Thereto Brought By Fred Churnock And Which Is Filed On Behalf Of A Potential Defendant, MUNCIE POWER PRODUCTS, INC., To The Potential Underlying Claim Of Fred Churnock, Is Appropriate?*

(Answered In The Negative)

IV. ARGUMENT

A. An Action For Declaratory Judgment Is Not Appropriate When The Underlying Claim Giving Rise To Said Action Is Essentially One Involving Personal Injuries Suffered By A "Potential" Plaintiff. An Action For Declaratory Judgment Is Especially Inappropriate When It Is Filed "Prior" To The Institution Of Any Claim By The Potential Plaintiff, And Particularly When Said Action Is Filed On Behalf Of A "Potential" Defendant To The Potential Underlying Personal Injury Claim.

In support of its Motion to Dismiss the instant Declaratory Judgment Action, the Defendant to the instant action, Fred Churnock, cites the well-established proposition of law which declares that the purpose of a Declaratory Judgment Action is not to enable a Defendant to a prospective negligence action to obtain a declaration of nonliability. *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969), cert. denied. 395 U.S. 959 (attached and

incorporated herein as Exhibit "A"). *See UNC Resources v. Benally*, 518 F. Supp. 1046, 1049 (D. Ariz. 1981), citing *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969), cert. denied. 395 U.S. 959 (1969), *Frito-Lay, Inc., v. Dent*, 373 F. Supp. 771 (N.D. Miss. 1974), 10 C. Wright and A. Miller, Federal Practice & Procedure §2765 (1973). *See also States Steam Ship Co. v. Featherstone*, 240 F. Supp. 830, 832-833 (D. Ore. 1965) ("construction and interpretation of written instruments) including contracts, insurance policies, statutes, ordinances, wills, and trusts) is the principle function of a declaratory judgment proceeding."). Moreover, §201 of the United States Code which deals primarily and exclusively with declaratory judgments, states expressly that:

> "In a case of actual controversy within its jurisdiction, . . . any Court of the United States, *upon the filing of an appropriate pleading*, may declare the rights and other legal relations of any interested party seeking such declaration, ..."

28 U.S.C.A. §2201 (emphasis added). *See Vorbeck v. Schnicker*, 660 F.2d 1260, 1265 (8th Cir. 1981). Finally, in order for a Federal Court to enter a Declaratory Judgment, there must be a "viable" and "actual" controversy before the Court so as to vest the Court with subject matter jurisdiction. *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct., 1944, and 23 L.Ed. 2d. 491 (1969). *See Duffy v. Quattrocchi*, 576 F. Supp. 336 (D.R.I. 1983).

In light of the well-established Rule as set forth above, it is clear that Declaratory Judgment is inappropriate in the instant case. The Declaratory Judgment Action filed on behalf of the Plaintiff, MUNCIE POWER PRODUCTS, INC., is merely designed to obtain a declaration of non-liability to the potential underlying personal injury claim of Fred Churnock. In the event that a personal injury claim is indeed brought by Fred Churnock, the Plaintiff to the instant Declaratory Judgment Action, MUNCIE POWER

PRDUCTS, INC., would surely have the opportunity to file a complete defense to any and all claims maintained by Fred Churnock in the future.

Furthermore, as set forth in §2201 of the United States Code, a Declaratory Judgment is only entered after the filing of an appropriate pleading. The Declaratory Judgment in the instant case filed on behalf of MUNCIE POWER PRODUCTS, INC., is the only document filed in the instant case. Therefore, the remedy of Declaratory Judgment is also untimely in the instant action. Finally, the instant Declaratory Judgment Action fails to vest the Federal Court with subject matter jurisdiction. As discussed previously, the instant Declaratory Judgment Action filed on behalf of the Plaintiff, MUNCIE POWER PRODUCTS, INC., arises from a potential personal injury claim which may be instituted in the near future. Thus, since the Declaratory Judgment Action presents no viable or actual controversy to the Federal Court at the present time, the instant action lacks justiciability, and any determination by the Federal Court would be a mere advisory opinion. Mere advisory opinions are not warranted in accordance with §2201 of the United States Code, which deals specifically with actions for Declaratory Judgment.

B. The Instant Declaratory Judgment Action Which Arises From Personal Injuries Suffered By Fred Churnock, Which Is Filed Prior To The Institution Of Any Personal Injury Claim Maintained By Fred Churnock And On Behalf Of A Potential Defendant, MUNCIE POWER PRODUCTS, INC., Is Inappropriate.

The Declaratory Judgment Action presently before the court is one which arises from an accident occurring on February 15, 1986, in which Fred Churnock, the Defendant in the instant action, suffered serious personal injuries. The personal injuries suffered by Fred Churnock were as a result of a power take-off machine which was later identified as being manufactured by the Plaintiff in the instant action, MUNCIE POWER PRODUCTS, INC.

The filing of this Declaratory Judgment Action is prior to the institution of any claim on behalf of Fred Churnock relating to the personal injuries suffered. Finally, the Declaratory Judgment Action is one which is filed on behalf of a potential Defendant, namely, MUNCIE POWER PRODUCTS, INC. to the potential underlying personal injury claim of FRED CHURNOCK. Therefore, the instant Declaratory Judgment Action filed on behalf of the Plaintiff, MUNCIE POWER PRODUCTS, INC., is clearly inappropriate.

V. CONCLUSION

WHEREFORE, the Defendant, FRED CHURNOCK, respectfully requests this Honorable Court to dismiss the Complaint for Declaratory Judgment on the basis that there exists no actual justiciable controversy and accordingly therefore lacks jurisdiction over the subject matter, and further that the Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

HOURIGAN, KLUGER, SPOHRER
& QUINN, P.C.

/s/ William F. Anzalone
William F. Anzalone, Esquire
Attorney for Defendant

EXHIBIT A

CUNNINGHAM BROTHERS, INC., a *Wisconsin Corporation, Plaintiff-Appellant,*

v.

Harry BAIL, Walter Gabel, William Katz, Ben Peters, Ed Ungrund, Dean Addis and Davidson Masonry & Restoration, Inc., an Illinois Corporation,
Defendants-Appellees.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT.

No. 17113.

March 10, 1969.

Rehearing Denied April 3, 1969.
Certiorari Denied June 16, 1969.
See 89 S.Ct. 2100.

Action by alleged tort-feasor against subcontractor and subcontractor's employees for declaratory judgment that it did not have charge of work being performed by contractor's employees at job site at time they were injured, that employees had no cause of action against tort-feasor and that subcontractor would be liable to indemnify alleged tort-feasor in event judgment was recovered against it. The United States District Court for the Eastern District of Illinois, Danville Division, Henry S. Wise, J., dismissed the action and the alleged tort-feasor appealed. The Court of Appeals, Castle, Chief Judge, held, inter alia, that where it was not certain that alleged tort-feasor would ever be compelled to pay any judgment for which subcontractor might be held liable as indemnitor, alleged tort-feasor was

not entitled to bring declaratory judgment action to determine its right to be indemnified.

Affirmed.

Jack E. Horsely, Richard F. Record, Jr. and Donald E. Castles of Craig & Craig, Mattoon, Ill., for plaintiff-appellant.

Harlan Heller and Dale A. Cini of Ryan & Heller, Mattoon, Ill., Leonard T. Flynn, of Franklin, Flynn & Palmer, Champaign, Ill., for defendants-appellees.

Before CASTLE, Chief Judge, and CUMMINGS and KERNER, Circuit Judges.

CASTLE, Chief Judge.

Plaintiff brings this appeal from the district court's dismissal of its three-count complaint filed against the individual and corporate defendants under the Declaratory Judgment Act, 28 U.S.C. §2201.[1] Plaintiff had contracted as general contractor to construct a building for Moore Business Forms, Inc., at Charleston, Illinois. Defendant, Davidson Masonry and Restoration, Inc., was engaged by plaintiff as the masonry subcontractor for the job, and the individual defendants were employees of Davidson who were injured when the platform on which they were standing collapsed.

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[1] § 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Defendant Gabel filed a complaint for personal injuries against plaintiff in the district court on October 1, 1967, plaintiff filed its declaratory judgment complaint on November 9, 1967, defendant Katz counterclaimed in the declaratory judgment suit, and at least one of the other individual defendants has since filed suit against plaintiff in a state court. The individual defendants have based their actions on the Illinois Structural Work Act, Ill.Rev.Stat., 1965, Ch. 48, § 60 et seq.

Count I of plaintiff's complaint is directed against the individual defendants only and seeks a declaration that plaintiff did not "have charge of" the work being performed by these defendants at the job site, within the meaning of the Illinois Structural Work Act, and that those defendants have no "cause of action" against plaintiff under the Act for any personal injuries they may have sustained on the date of the accident. Counts II & III of the complaint are directed only against Davidson Masonry & Restoration, Inc. Count II seeks a declaration that Davidson, by reason of its contract with plaintiff, is liable to indemnify and hold plaintiff harmless for any amount which may be recovered against plaintiff by the individual defendants. The district court dismissed the complaint and held that the action was inappropriate for declaratory relief.

Plaintiff contends that the district court erred in dismissing the complaint since an action by a potential tort defendant against the potential plaintiffs should fall within the purpose of the Declaratory Judgment Act. Thus, instead of having to wait and be sued in different state and federal forums by the various injured parties, plaintiff argues that it should be allowed to bring them together in one action, along with the alleged indemnitor, and thereby adjudicate the rights of all the parties at one time and place.

We hold that the district court was correct in dismissing the complaint, and accordingly affirm the judgment below.

Regarding the individual defendants, we are of the opinion that to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tort-feasor would be a perversion of the Declaratory Judgment Act. The primary purpose of that Act is "to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued." E. Edelmann & Co. v. Tripple-A Specialty Co., 88 F.2d 852, 854 (7th Cir. 1937). See also Milwaukee Gas Specialty Co. v. Mercoid Corp., 104 F.2d 589, 591-592 (7th Cir. 1939); Luckenbach S.S. Co. v. United States, 312 F.2d 545 (2d Cir. 1963); 6A Moore's Fed. Practice ¶ 57.06, pp. 3021-22 (1966).

Since it is not contended that the present action was brought to avoid damages which would accrue if a certain course of conduct were taken in the future, plaintiff must establish that this suit falls within some other purpose of the Declaratory Judgment Act. Plaintiff attempts to support its action by arguing that the purpose of the Act is not confined solely to settling controversies before they ripen into legal liabilities, but is broad enough to permit the determination of rights which have arisen due to an alleged negligent act which has already occurred. Plaintiff also contends that this action was not brought to determine the issue of negligence, but only to determine the rights of the parties under the contracts between them so as to avoid multiplicity of action.

However, plaintiff has failed to demonstrate how the allowance of the instant declaratory judgment action would "effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Sears, Roebuck & Co. v. American Mutual Liability Co., 372 F.2d 435,

438 (7th Cir. 1967); American Auto. Insurance Co. v. Freundt, 103 F.2d 613, 619 (7th Cir. 1939); Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321, 324 (4th Cir. 1937). Rather, regarding the individual defendants, plaintiff seems to be attempting to "try issues or determine the validity of defenses in pending cases," as was condemned by *Freundt* and *Quarles, supra.*

Moreover, couching the suit in terms of contract rather than tort does not change the nature of the action. The issue of plaintiff's negligence would necessarily be tried since the individual defendants would be compelled to counter-claim under Rule 13(a), Fed.Rules Civil Proc. Rules 20(b) and 42(b), regarding separate trials, would be of little value to these defendants, since plaintiff's liability, if any, would be determined in the primary action.

Thus, there is good reason for the noted lack of precedent supporting plaintiff's position. To allow a declaratory judgment action under the facts before us would be to allow a substitute for the traditional procedures for adjudicating negligence cases. We agree with the conclusion reached in Sun Oil Co. v. Transcontinental Gas Pipe Line Corp., 108 F.Supp. 280, 282 (E.D.Pa.1952), aff'd (adopting opinion of district court), 203 F.2d 957 (3d Cir. 1953), that "it is not one of the purposes of the declaratory judgment acts to enable a prospective negligence action defendant to obtain a declaration of non-liability."[2]

To so reverse the roles of the parties would affect more than merely the form of action, but would jeopardize those procedures which the law has traditionally provided to injured parties by which to seek judicial relief. Although "[t]he existence of another adequate remedy does not pre-

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[2] Of course, non-liability may be declared in appropriate cases. State Farm Mutual Auto Ins. Co. v. Mossey, 195 F.2d 56 (7th Cir. 1952), cert. den. Du Bois v. Mossey, 344 U.S. 869, 73 S.Ct. 109, 97 L.Ed. 674.

clude a judgment for declaratory relief in cases where it is appropriate," Rule 57, Fed. Rules Civil Proc., we hold that such relief is inappropriate in the instant case since "more effective relief can and should be obtained by another procedure." Chicago Metallic Mfg. Co. v. Edward Katzinger Co., 123 F.2d 518, 520 (7th Cir. 1941).

Although our holding may require the plaintiff here to litigate a number of lawsuits with the injured parties, we feel that this result does not outweigh the right of a personal injury plaintiff to choose the forum and the time, if at all, to assert his claim. We agree with plaintiff that a declaratory judgment action should not be dismissed solely because a more traditional remedy is available. Otherwise, many justiciable declaratory judgment actions would be dismissed on that ground. However, when the traditional remedy provides the parties with the procedural safeguards required by the law to insure the availability of a proper remedy, the courts, in exercising their discretion,[3] may properly dismiss the declaratory judgment action. Since the sustaining of plaintiff's suit in the instant case would force an injured party to litigate a claim which he may not have wanted to litigate at a time which might be inconvenient to him or which might precede his determination of the full extent of his damages, and in a forum chosen by the alleged tortfeasor, we hold that the action was inappropriate for declaratory relief and was therefore properly dismissed against the individual defendants.

There remains the issue of whether plaintiff may seek declaratory relief against the corporate defendant (Davidson), the alleged indemnitor. Initially, two observations

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[3] It is well-established that declaratory relief is discretionary, Brillhart v. Excess Ins. Co., 316 U.S. 491, 494, 62 S.Ct. 1173. 86 L.Ed. 1620 (1942), although a reviewing court may substitute its own judgment for that of the trial court if the latter court's exercise of its discretion is "erroneous." Sears, Roebuck & Co. v. American Mut. Liab. Ins. Co., 372 F.2d 435, 438 (7th Cir. 1967).

should be made. First, there is no indemnity clause contained in the contract, and plaintiff's claim against Davidson seems to be really based on a common law indemnity theory. Second, during oral argument counsel for plaintiff stated that if we held that the individual defendants should be dismissed, then the plaintiff would probably rather file a third-party complaint against Davidson in the Gabel action, to determine the issue of indemnity. Irrespective of this concession, we are of the opinion that Plaintiff could not maintain a declaratory judgment action against Davidson alone.

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941); See also Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-242, 57 S.Ct. 461, 81 L.Ed. 617 (1937).

It has been held that when an insured is being sued for damages and calls upon his insurer to indemnify and defend the suit, the insurer is "entitled to be advised by a declaratory decree whether it is obligated to defend and indemnify the insured against the claim upon which the suit is brought." C. Y. Thomason Co. v. Lumbermen's Mutual Casualty Co., 183 F.2d 729, 733 (4th Cir. 1950); Sears, Roebuck & Co. v. American Mut. Liab. Ins. Co., 372 F.2d 435, 440 (7th Cir. 1967).

However, in the normal indemnity situation, where, as here, no contractual duty to defend exists, no duty to do anything arises until the alleged indemnitee is adjudged liable. Thus, in the instant case, there is no immediate controversy between the parties since it is not certain that plaintiff will ever be compelled to pay any judgment for which Davidson could be held liable as indemnitor. See

National Valve & Mfg. Co. v. Grimshaw, 181 F.2d 687, 689 (10th Cir. 1950). In these circumstances we hold that the interests of justice would not be served by entertaining a declaratory judgment action at this time.

For the foregoing reasons, the judgment below is affirmed.

Affirmed.

CERTIFICATE OF SERVICE

WILLIAM F. ANZALONE, ESQUIRE, hereby certifies that he, as counsel for Defendant, has forwarded a true and correct copy of the foregoing Brief of Defendant, Fred Churnock, in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State A Claim upon Which Relief Can Be Granted to the following:

Harry P. Mattern, Esquire
1021 United Penn Bank Bldg.
Wilkes-Barre, PA 18701

by hand delivery, this 8th day of January, 1988.

HOURIGAN, KLUGER, SPOHRER
& QUINN, P.C.
/s/ William F. Anzalone
William F. Anzalone, Esquire
Attorney for Defendant

APPENDIX G

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Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.
342 North Pershing Drive
Muncie, Indiana 47305
A corporation organized under the
Laws of the State of Indiana

Plaintiff,

vs.

FRED CHURNOCK
A resident of the State of
Pennsylvania, residing within
the Middle District of the
State of Pennsylvania

Defendant.

FILED
JAN 21 1988

BRIEF OF PLAINTIFF, MUNCIE POWER PRODUCTS, INC., ("MUNCIE") IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION OF THE COURT OVER THE SUBJECT MATTER AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO F.R.C.P. 12(b) (1) and (6)

Plaintiff, Muncie Power Products, Inc. (hereinafter "Muncie"), responds to Defendant's ("Churnock's") Motion to Dismiss by requesting that it BE DENIED for the following reasons:

I. THE OMISSION OF A SALIENT FACT FROM DEFENDANT "CHURNOCK'S" BRIEF REQUIRES A RESTATEMENT OF THE HISTORY OF THE CASE AND A STATEMENT OF THE FACTS

Defendant Churnock contends that this case should be dismissed because there is not yet an "actual" and "viable" controversy (e.g. Brief p. 4). Mr. Churnock states, in this respect, that Plaintiff "Muncie" is only a "potential" defendant (Brief p. 5). Mr. Churnock's Brief omits any mention of the salient, *certified* letter which his counsel sent to Muncie on October 30, 1987 threatening suit. This letter is attached to Muncie's Complaint as Exhibit A, and thus is a part of that pleading. The letter is, again, attached hereto as Exhibit A.

As can be seen from the date stamp, Muncie received this certified letter on November 5, 1987. As sworn to by Mr. Snyder, Muncie's Corporate Vice President, in his accompanying affidavit, Exhibit B, the letter not only is a threat, but was properly treated as a threat by Muncie, who promptly invoked corporate and insurance carrier procedures to protect and defend itself. Its contents are worthy of note because they are largely dispositive of the issue presented by Mr. Churnock's Motion.

The fact that the letter is "certified", itself is indicative of its seriousness. The first paragraph, furthermore, states:

> "Please be advised that my office has been retained to represent Fred Churnock who received very serious personal injuries *as the result of* a power take-off manufactured *by you*. The date of the accident was February 15, 1986." (underlining added)

This first paragraph was reasonably taken by Muncie to be an accusation that its power takeoff was, at least in some way, the cause of the "serious personal injuries". The words "as the result of" and "by you" make this clear.

The second paragraph goes on to state:

> "I would appreciate your turning this letter over to *your insurance carrier* with instructions that they contact the undersigned. The nature of *the case* is a *products liability claim*. My client had his arm amputated *as the result of* a power take-off manufactured *by you* and sold to Voyton Brothers Truck Body Manufacturing Co. at Parrish and High Streets, Wilkes-Barre, PA. I have also placed Voyton Brothers *on notice of this suit*". (underlining added)

This second paragraph lays to rest any question as to whether an "actual" or "viable" controversy existed. The term "the case", means a "case" or "controversy" as used in 28 USC §2201, first line. So does the term "claim" and the term "suit", as specifically used by Mr. Churnock's attorney in the above quote. The term "as the result of" a Muncie product is, again, used here. The request to turn the matter over to "your insurance carrier" means that monetary compensation is being sought.

The last paragraph of the letter should not be ignored. It states:

> "I thank you in advance for your *immediate* attention to this *request*." (underlining added)

The term "immediate" lends emphasis to the threat of suit. The "request" refers, of course, to the monetary compensation that will be sought from Muncie's product liability insurance carrier.

Given this letter, the history of this case and its facts are as follows:

1. On February 15, 1986 Mr. Churnock suffered a severe injury, by way of an amputation of his arm, when, apparently, he crawled under his truck with the engine running, and attempted to correct a perceived problem in some component of the auxiliary power system, the power takeoff of which is allegedly manufactured by Muncie.[1] Mr. Churnock asserts that some portion of his clothing caught in the rotating shaft when, lying under the truck, he reached his hand up into the system to correct the mechanism, thus injuring his arm. (Ex. B, Aff. David M. Snyder).

2. The accident took place within the Middle District of Pennsylvania and Mr. Churnock resides within this District. Mr. Churnock sought the representation of a well known personal injury attorney, Mr. William Anzalone, who regularly practices law within the Middle District, and before this Court, and whose firm has offices close by the Court in Scranton, Pa. (see letterhead, Ex. A). The trying of this case in this federal court presents no hardship to Mr. Churnock as compared to an available local state court of his choice.

3. Muncie is an Indiana corporation. If Mr. Churnock had sued Muncie in a local state court, without joining Voyton Bros. (see para. 2, Ex. A), Muncie, as a matter

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[1] The auxiliary power system on a dump truck is made up of numerous components from controls to a power takeoff, to an interconnected hydraulic pump, to valves and cylinders in a hoist. They may come from numerous different manufacturers.

of right, could have removed this case to this Court pursuant to 28 USC §1441, 1446.[2]

4. Mr. Churnock is not prevented, by the subject action, from joining Voyton Bros. or any other alleged "tort feasor" in this case if he desires. Mr. Churnock is a *defendant* here. His joinder of Voyton, or anyone else, by way of a third-party crosspleading pursuant to Rule 14 F.R.C.P., does not deprive this Court of diversity jurisdiction under 28 USC §1332. *Lamar Haddox Contractor, Inc.* v. *R. B. Potashnick*, 552 F. Supp. 11 (M.D. La. 1982); *H. L. Peterson Company* v. *Applewhite*, 383 F.2d 430 (5th Cir. 1967); *Huggins* v. *Graves*, 337 F.2d 486 (6th Cir. 1964). Full relief of all claims between the parties is, therefore, immediately available in this Court.

5. Apparently after investigation, Mr. Churnock's chosen counsel, William F. Anzalone, voluntarily chose to write and send the above-cited certified letter (Ex. A) advising Muncie that its product had caused a serious injury, that there was a "case", that Mr. Churnock was making a "products liability claim" against Muncie and that he had also placed Voyton "on notice of this suit." He further requested "immediate" consultation with Muncie's insurance carrier, which could have been for only one reason, i.e. to demand compensation. Mr. Churnock and his counsel apparently chose not to file suit at that time, either in this federal court or in a local state court (which were their choices). Indeed, to this date, no known state or federal court action has been filed by Mr. Churnock.

6. Following receipt of Mr. Churnock's threatening letter, Muncie reacted, as any reasonable, competent, small corporation would. Its personnel invoked proper litigation

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[2] Mr. Churnock's Brief raises no allegation that his claim is for less than $10,000 or that there is no diversity of citizenship as required by 28 USC §1332, which vests jurisdiction in this federal court to hear a products liability claim as between residents of two different states.

procedures to ascertain the facts, attempt to find the truck in question, and to notify its products liability insurance carrier of the pending claim. (Ex. B, Snyder Aff.).

7. Muncie filed its Declaratory Judgment Action to obtain speedy access to the evidence to prevent its loss, and to invoke its *right* as an out-of-state litigant to seek impartial justice in a federal court. As is made clear by the Snyder Affidavit, Ex. B, the nature of the technology involved and the harsh environments which trucks are used in, make it imperative that the alleged accident parts and truck be inspected by experts as soon as possible, in their original condition, to prevent possible loss of important forensic evidence. Awaiting the end of the Statute of Limitations period could greatly jeopardize Muncie's ability to ascertain the true cause of the accident, and thereby properly defend itself. This Court affords prompt access to the accident parts pursuant to the expeditious nature of Rule 34 F.R.C.P. An appropriate request under Rule 34 has already been served on Mr. Churnock by Muncie.

Given these facts, Muncie respectfully submits that the true issue presented by Defendant's Motion to Dismiss is:

II. ISSUE PRESENTED

After receiving a certified letter threatening a product liability suit from an attorney for a seriously injured person, should a declaratory judgment action promptly filed by the out-of-state manufacturer of the target product alleged to have caused the injury, be entertained by the federal court in whose district the injury occurred and in which the plaintiff (and presumably all fact and medical witnesses) resides, when:

there is diversity of citizenship; the amount in controversy is more than $10,000; the manufacturer could have removed the case to this federal court anyway, pursuant to 28 §1441, if filed by the injured party in a local state court; the injured party is not precluded from joining any

others whom he alleges contributed to his accident and can thus obtain a full adjudication of his "claim"; there is an imperative need for prompt forensic investigation, available through the Federal Rules of Civil Procedure, of the alleged accident parts on a truck subject to loss or harsh environmental conditions to prevent loss of important evidence; there is no hardship to the injured person from having to litigate the matter now, in his local federal court rather than waiting his choice of either his local state court or this federal court; and when there is no other pending action, state or federal, involving the issues presented.

> [Muncie respectfully submits that the answer is in the affirmative, and Defendant's Motion should be denied.]

III. ARGUMENT

A. The Threatening Letter Sent By Mr. Churnock's Counsel Gives Rise To An "Actual Controversy" Within The Meaning Of 28 USC §2201

The relevant potion of 28 USC §2201 states:

> "§2201 Creation of remedy
> (a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations, of any interested party seeking such declaration, ..."

As long ago as 1937, the U.S. Supreme Court defined the meaning of "actual controversy" as used in the Declaratory Judgment Act. Speaking through Chief Justice Hughes in *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 464, the Court held:

> "A 'controversy' . . . must be one that is appropriate for judicial determination. [cases omitted]

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. [cases omitted] The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."

Clearly, such a situation exists here between Mr. Churnock and Muncie, whom he accuses in a threatening, certified letter of causing him serious injury, amounting to a "products liability claim". Indeed, the various federal circuits, including the Third Circuit Court of Appeals, have characteristically held that a threatening letter, such as received by Muncie, gives rise to an "actual controversy" sufficient to invoke Declaratory Judgment Act jurisdiction under 28 USC §2201. For example, in *Creamery Package Mfg. Co.* v. *Cherry-Burrell Corp.*, 115 F.2d 980 (3rd Cir. 1940) the Third Circuit reversed the dismissal of a Declaratory Judgment Action Complaint holding that the District Court had exceeded its discretion in dismissing such a complaint. The Third Circuit specifically held here in 1940 that threatening letters, contrary to defendant's contention, do, indeed, give rise to an "actual controversy", within the meaning of the Act.[3]

In the *Creamery Package* case, supra, the *tort* alleged was one of patent infringement. 28 USC §1338 grants jurisdiction to the federal courts to adjudicate such alleged torts. In the case of Mr. Churnock's injury, the alleged tort is a "products liability claim". Jurisdiction is vested in this federal court pursuant to 28 USC §1332. In both instances, 28 USC §2201 gives the Court the right, and thus jurisdiction, to hear the case.

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[3] The District Court had also held that threatening letters give rise to an actual controversy. See 115 F.2d at 981-2. Reversal was on the issue of notification. Note, particularly, that the 3rd Circuit at 115 F.2d 983 cites *Aetna* supra, and specifically states that a threatening letter gives rise to an "actual controversy" within the meaning of §2201.

Indeed, the courts have regularly recognized 28 USC §1332 as granting subject matter jurisdiction under the Declaratory Judgment Act. See *Beacon Construction Co. Inc.* v. *Matco Electric Co. Inc.*, 521 F.2d 392 (CA 2, 1975) [affirming the grant of declaratory relief under §2201 in a mechanics lien case, jurisdiction being based upon §1332]. *Keene Corp.* v. *Insurance Co. of North America*, 667 F.2d 1034 (CA D.C., 1981) cert. denied 102 S.Ct. 1644 (1982) [Declaratory Judgment Act held proper vehicle for resolving the rights of parties and their insurers in asbestoses tort cases, jurisdiction based on §1332 (fn 10) and §2201 because an "actual controversy" was found to exist].

Numerous other cases, more recent than *Creamery Package*, have also recognized that a threat of suit gives rise to an "actual controversy" within the meaning of 28 USC §2201. For example, in referring to a written threat of suit in *Westinghouse Electric Corp.* v. *Aqua-Chem Inc.*, 278 F. Supp. 975, 976 (E.D. Pa. 1967) the court said:

> "These allegations plainly spell out a justiciable controversy of the kind which the Declaratory Judgment Act was designed to settle."

See also in this regard, *Mixing Equipment Co. Inc.* v. *Innova-Tech Inc.*, 228 USPQ 221 (E.D. Pa. 1985) [charges of infringement and threats of litigation constituted a "justiciable controversy" under the Declaratory Judgment Act]; *Cuvcraft, Inc.* v. *Chromcraft, Inc.*, 193 USPQ 371 (E.D. Pa. 1977) ["Actual controversy"—present if plaintiff patentee has charged the defendant with an infringement suit either directly or indirectly]; *Simmonds Aerocessories* v. *Elastic Stop Nut Corp.*, 257 F.2d 485 (3rd Cir. 1958) [actual controversy exists invoking Declaratory Judgment Act where there has been direct or implicit threat of litigation. Actual controversy may also exist even where patentee was exercising every effort to avoid litigation or where patentee is disabled from maintaining any action against the particular alleged infringer seeking the declaration].

In this latter *Simmonds* case, supra, the Third Circuit specifically states:

> "This court has emphasized that the Declaratory Judgment Act should have a liberal interpretation because it is remedial in character."
>
> 257 F.2d at 489

After citing and discussing the criteria for an "actual controversy" as established by the Supreme Court in *Aetna*, supra, and *In Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941), the Third Circuit went on to hold:

> "It has been held . . . that it is not essential that there be a direct threat of litigation in order to invoke the Declaratory Judgment Act. It is sufficient if such a threat is implicit in the attitude of the defendant as expressed in circumspect language contained in a letter . . ."
>
> (257 F.2d at 490)

There is nothing circumspect about the language used in Mr. Churnock's threatening letter. It is clearly sufficient to invoke the Declaratory Judgment Act, particularly if, as the Third Circuit requires, the Act is to be liberally interpreted.

B. Federal Courts Regularly Hear "Product Liability Claims" And The Law Leaves To The Discretion Of This Court Whether It Should Hear This One In The Interest Of Justice

Mr. Churnock's Brief is devoid of any authority which holds that "product liability claims" can not be adjudicated under the Declaratory Judgment Act. Nowhere does the Act, its Revision Notes, or its legislative history contain such a statement. Indeed, the rendering of such a generic ruling by extracting out-of-context, piecemeal phrases from prior cases, decided on their own unusual facts, would be

directly contrary to the purpose of the Act and the law. See, in this respect, the Supreme Court case of *Aetna* v. *Haworth* supra, and perhaps the leading case on the subject, of *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F.2d 321 (4th Cir. 1940) decided shortly after enactment of the Declaratory Judgment Act and interpreting the breadth of the Act. *Quarles*, supra, is cited as authority by the Second Circuit in *Beacon* supra, and twice by the Third Circuit in *United States Fidelity & Guaranty Co.* v. *Koch*, 102 F.2d 288 (3rd Cir. 1939) [reversing the District Court's refusal to hear a declaratory judgment case arising out of an insurance claim for personal injury], and *Samuel Goldwyn Inc.* v. *United Artists Corp.*, 113 F.2d 703 (3rd Cir. 1940) [reversing the District Court's refusal to hear a declaratory judgment case and remanding to hear evidence so that all factors could be established before a decision was made because the decision not to hear a case must be based upon "sound reasons" given "all the circumstances" (at 710)].

As stated by the Fourth Circuit in *Quarles* at p. 325:

> "The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purpose intended, i.e. to afford a speedy and inexpensive method of adjudicating legal disputes . . ."

Federal courts regularly hear and decide "product liability claims" through removal actions pursuant to 28 USC §1441. It would be utterly illogical, and in conflict with §1441, if §2201 were interpreted, as Mr. Churnock requests, to *ipso facto* preclude resolution of product liability claims. Defendant Churnock should not, therefore, be heard to argue that this Court has no subject matter jurisdiction or that the Declaratory Judgment Act was *never* meant to permit federal courts to hear such cases. Indeed, this is contrary to the very cases which Mr. Churnock sites in behalf of his Motion.

While Churnock's cases ultimately dismiss the D. J. action before the Court, at its discretion, they are distinguishable on their facts, as discussed more thoroughly infra. Because of Churnock's heavy reliance on *Cunningham Brothers, Inc.* v. *Bail*, 407 F.2d 1165 (7th Cir. 1969), however, it is worthy of discussion here. This case and the others cited by Churnock derive their support from general "dicta" language found in the 1952 case of *Sun Oil Co.* v. *Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280 (E.D. Pa. 1952) [affirmed without separate opinion 203 F.2d 957 (3rd Cir. 1953)]. Careful attention to what the District Court said in *Sun Oil* supra, is therefore important. In that case, where the District Court in its discretion refused to use the Declaratory Judgment Act because under the situation presented, it would have run afoul of the purpose of the federal transfer statute,[4] the Court *nevertheless* held:

> "... although there appears to be no case directly in point on the problem, it would seem that the rule is that a declaratory judgment action should not be entertained when it is initiated by a prospective or actual defendant in a tort action.[5] *However, since the problem is largely one of discretion of a court, it seems that conceivably there might be an exception to the rule, the exception being that the declaratory judgment proceeding should be permitted in this type of case when it would be in the interest of justice or for the convenience of the parties to permit it.*" [at 282]

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[4] In Mr. Churnock's case, to hold the way Churnock argues runs afoul of the removal statute §1441. Thus, the true reasoning in *Sun Oil*, supra, is actually in Muncie's favor, not Churnock's.

[5] This unsupported comment is demonstrably wrong, as has already been shown by citation to *Creamery Package* supra, and the other cases noted in Section IIIA. of this Brief.

(underlining added)

The underlining portion of this quote, undermines the entire fabric of Mr. Churnock's argument and is express support for Muncie's D. J. Complaint under the facts of this situation. In this respect, particular note should be taken of the fact that in quoting from another portion of *Sun Oil*, the Seventh Circuit Court in *Cunningham*, supra at fn 2, takes specific note of the fact that:

> "Of course, non-liability may be declared in appropriate cases." (case omitted, p. 1168)

The simple fact of the matter is that virtually all of the cases, including those cited by Muncie and Churnock, recognize the principles succinctly stated in *Beacon Const. Co.* supra, *Simmonds* supra, *Sun Oil* supra, and *Quarles* supra:

In *Beacon* at p. 397

> "While a district judge has discretion in determining whether to grant declaratory relief . . . .his discretion is not unlimited."

In *Simmonds*, supra at 489

> ". . .the Declaratory Judgment Act should have a liberal interpretation . . ."

In *Sun Oil*

> ". . .the declaratory judgment proceeding should be permitted in this type of case when it would be in the interest of justice or for the convenience of the parties to permit it." (at p. 282)

In *Quarles*, supra

> "The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purpose intended, i.e. to afford a speedy and inexpensive method of adjudicating legal disputes . . ." (at p. 325)

C. The Particular Facts In This Case Show That The Court Should Invoke Its Discretionary Power And Deny Churnock's Motion In The Interest Of Justice And For The Convenience Of The Parties

It was Mr. Churnock's choice to threaten Muncie with suit, thus invoking the time and expense of defending, investigating, and setting up the insurance procedures by Muncie and its insurance company. If Mr. Churnock had not done this, no "actual controversy" would have arisen and Muncie would have had no right to do what it did. This fact, alone, distinguishes this case from those cited by Mr. Churnock in his behalf.

Once Mr. Churnock made his choice, however, and threatened Muncie, he should not now be allowed to sit back on his rights and allow evidence to be lost while a cloud of impending, potentially large monetary damages, determined under the emotionalism of a serious injury, hangs over Muncie's head. Obviously, there is a very serious and actual controversy, and Muncie's rights are seriously in doubt. Is Muncie at fault? Was there something wrong with a Muncie product? Did it cause a man's arm to be amputated? If so, what is the amount of the damages? Was Muncie's product involved, or was it some other manufacturer's component? Speedy and impartial justice is the purpose of the Declaratory Judgment Act, and Muncie seeks such justice here.

Muncie earnestly contends that under the particular facts of this case, Mr. Churnock can not make out a showing that would allow this Court to dismiss Muncie's case. In short, the facts herein make out a compelling need, despite an overburdened federal judiciary, for Mr. Churnock's Motion to be promptly denied so that this case may proceed forthwith. A summary of those facts is as follows:

1. There is a compelling need for immediate expert access to the alleged accident parts pursuant to Rule 34 F.R.C.P. Failure to obtain such access

would result in serious deprivation of due process of law. (Snyder Aff., Ex. B)

2. Muncie, pursuant to 28 USC §1441 and §1446, has the right to be in a federal court as an out-of-state defendant in order to obtain impartiality as an out-of-stater. See *Heniford* v. *American Motors Sales Corp.* 471 F. Supp. 328, 335 (D.C. S. C. 1979).

3. Muncie, if sued by Mr. Churnock in his local state court, would have had the right to remove the case to this federal court pursuant to §1441, there being no dispute that there is diversity of citizenship, or the amount in controversy is greater than $10,000.

4. Mr. Churnock, to this date, has filed no known action against Muncie. His Brief is devoid of any allegation that he would have chosen a local state court instead of this federal court.

5. There is no hardship or inconvenience occasioned upon Mr. Churnock from being in this Court, rather than a state court. He has all of his remedies available to him against Muncie or anyone else, by way of crosspleading pursuant to Rule 14 F.R.C.P. The only reason, then, why Mr. Churnock would want this case dismissed is to later file in a state court so as to obtain an unfair advantage over an out-of-stater, a reason demonstrably contrary to the purpose of 28 USC §1441. (See *Heniford*, supra)

6. Speedy and impartial justice is best insured by Muncie's prompt Complaint in this federal court and the use of the more adequate Federal Rules of Civil Procedure, particularly as they affect expert testimony and opinions.

7. Mr. Churnock gives no factual reasons why this case should not be kept in this Court. Indeed, he can not do so. In all reasonable probability, all fact and medical witnesses reside within the Middle Dis-

trict, as do the accident parts, plaintiff, and his counsel. Failure to show such reasons should result in a denial of the Motion. This Court's discretion to dismiss is not unlimited. It must have "sound reasons" for doing so, given "all the circumstances". (See *Samuel Goldwyn Inc.*, supra, 3rd Cir. 113 F.2d at 710.) Mr. Churnock does not and can not cite any "sound reason" for dismissal.

8. Mr. Churnock chose, voluntarily, to threaten Muncie, thereby putting Muncie, its manufacturing process, and its product design under a serious cloud as to whether Muncie is a "tort feasor", whether it should change its procedures, alter its business, lay off personnel, etc. Mr. Churnock should not now be allowed to keep this cloud hanging over Muncie's head, while evidence is lost. That is the very purpose of the Declaratory Judgment Act. . . *speedy* and *impartial* justice. Nothing in this case dictates the need for dismissal.

D. The Case Cited In Mr. Churnock's Brief Are All Distinguishable On Their Particular Facts

The cases cited in Defendant's Brief dismissing a Declaratory Judgment Action are clearly distinguishable, both factually and procedurally, from the present case.

The following is a summary:

Cunningham Brothers, Inc. v. *Bail*, 407 F.2d 1165 (7th Cir. 1969) did not involve a prior threat of suit. In fact, one defendant had filed a complaint in district court one month prior to filing the Declaratory Judgment Complaint, and a subsequent state suit was filed by another defendant. No such situation occurs here.

UNC Resources v. *Benally*, 518 F. Supp. 1046 (D. Ariz. 1981) did not involve a prior threat of suit. In this case several parties, including named defendants, had filed personal injury suits involving the same issues prior to the

filing of the Declaratory Judgment Complaint. No such situation exists here.

Frito Lay v. *Dent*, 373 F. Supp. 771 (N. D. Miss. 1974). This case, like all of the others cited by Defendant, did not involve a prior threat of suit. Three suits over the same matter had been filed prior to the filing of the Declaratory Judgment Complaint. Final judgment had been entered in two, one was still pending, and a motion to consolidate all actions was pending. No such facts exist here.

States Steamship Co. v. *Featherstone*, 240 F. Supp. 830 (D. Ore. 1965). This case, a libel case, did not involve a prior threat of suit. The damages were alleged to be approximately $1,000. There was a question of conflict with the Federal Jones Act, Title 46 U.S.C. §688, assuring a litigant a right to trial by jury in a state court. The case specifically recognizes the discretion of the Court, citing language very similar to *Sun Oil*, supra, recognizing an "exception" where "the interest of justice" is involved.

In short, Mr. Churnock's Brief fails to cite a single case which holds that this Court is prohibited from proceeding upon Muncie's Complaint.

CONCLUSION

Muncie's Complaint is properly filed and, in the interest of justice, should be maintained. Defendant Churnock, who voluntarily caused the Complaint by threatening Muncie and its business with a very serious lawsuit, should not now be heard to say that Muncie's Complaint should be dismissed. The time is now for justice and preservation of evidence, not later when both may be lost.

Respectfully submitted,

/s/ Harry P. Mattern
Harry P. Mattern, Esq.
FARRELL, FRANK &
MATTERN
1021 United Penn Bank Building
Wilkes-Barre, Pennsylvania 18701
(717) 822-5643

Attorney for Plaintiff,
Muncie Power Products, Inc.

OF COUNSEL:

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HALL, MYERS & ROSE
200 Semmes Building
10220 River Road
Potomac, Maryland 20854
(301) 365-8000

EXHIBIT A

HOURIGAN, KLUGER, SPOHRER & QUINN
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TELECOPIER (717) 829-3460

Direct Dial: (717) 825-2719

October 30, 1987

Muncy Power Products
32 North Pershing Drive
Muncy, Indiana 47305

RE: Fred Churnock
Our File No: 26355-001

Dear Sirs:

Please be advised that my office has been retained to represent Fred Churnock who received very serious personal injuries as the result of a power take-off manufactured by you. The date of the accident was February 15, 1986.

I would appreciate your turning this letter over to your insurance carrier with instructions that they contact the undersigned. The nature of the case is a products liability claim. My client had his arm amputated as the result of a power take-off manufactured by you and sold to Voyton Brothers Truck Body Manufacturing Co. at Parrish and High Streets, Wilkes-Barre, PA. I have also placed Voyton Brothers on notice of this suit.

I thank you in advance for your immediate attention to this request.

With kind regards,

/s/ William F. Anzalone
William F. Anzalone

WFA:rar
cc: Fred Churnock

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Received Muncie Power Products Nov-5 1987

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. CV-87-1735

MUNCIE POWER PRODUCTS, INC.
342 North Pershing Drive
Muncie, Indiana 47302
A corporation organized under
the Laws of the State of Indiana

Plaintiff,

vs.

FRED CHURNOCK
A resident of the State
of Pennsylvania, residing
within the Middle District
of the State of Pennsylvania

Defendant.

AFFIDAVIT OF DAVID M. SNYDER

STATE OF INDIANA)
SS.
COUNTY OF DELAWARE)

I, David M. Snyder, being duly sworn, depose and state that:

1. I have been employed continuously by Plaintiff "Muncie" since 1966, serving in the capacity, for at least the last 15 years, as Vice President of Engineering when just recently I became Corporate Vice President.

2. Muncie is a small, closely held corporation whose corporate offices are located in Muncie, Indiana. It is an

Indiana corporation. Muncie maintains small distribution centers, none of which are located in the State of Pennsylvania. Muncie recently purchased from Sperry Vickers its share of a joint venture operation in Oklahoma, which produces a new and patented power takeoff device designed by Sperry Vickers personnel. Muncie does not reside in or have an established place of business in the State of Pennsylvania.

3. I have a B.S.M.E. degree in mechanical engineering from Purdue University in 1963 and a Master's Degree in Business from Ball State University in 1974. I have also audited graduate courses in the fluid power field at the Milwaukee School of Engineering, University of Wisconsin.

4. In my more than 20 years experience at Muncie, I have become very familiar with Muncie's products, including those distributed for other manufacturers by Muncie, such as Dana power takeoff devices, often mistakenly believed by laymen to be Muncie's. I have also become very familiar with the various applications of power takeoff devices, how they are used, and the potentials for misuse, abuse, misinstallation, and wear out, all of which are beyond Muncie's control because Muncie does not install power takeoffs.

5. I am further aware of numerous instances where our power takeoffs are coupled, by others, to controls and shafts of other manufacturers not affiliated with Muncie and over whom Muncie has no control.

6. In recent years, Muncie has been selling a power takeoff device designed by Sperry Vickers personnel. We have been unable to ascertain whether the power takeoff device allegedly involved in Mr. Churnock's accident is actually a Dana device, distributed by Dana or Muncie, or one designed by Sperry Vickers and sold by Muncie, or whether it was some else's. Inspection is necessary to ascertain this fact.

7. From the description of the accident given to Muncie's representatives by Mr. Churnock's counsel, it is believed that Mr. Churnock may have been having trouble either with the power takeoff, the dump pump, or some other component on a dump truck which he owned. Leaving the engine running, he crawled under the truck, reached up to the power takeoff, dump pump, or some other component, when his coatsleeve allegedly caught in some component, severely injuring his arm. What actually happened can not be ascertained to any reasonable degree of certainty without inspection of the truck in a reasonably unaltered condition.

8. In order to have any chance to ascertain the true reason Mr. Churnock crawled under the truck with the engine running, it is imperative that an investigation be undertaken as soon as possible. Dump trucks are used in rugged environments, are subject to heavy weathering and corrosion, all of which can remove, confuse, or destroy important forensic evidence which would prove the true "cause" of the problem. The longer one must wait, the greater the potential for lost evidence in this particular technology.

9. On November 5, 1987 Muncie received a letter from William F. Anzalone, attorney for Mr. Churnock, threatening suit against Muncie and advising us to contact our insurance carrier. We took this letter, attached as Ex. A to Muncie's Complaint, as a definite threat of litigation (i.e. "suit"). We immediately contacted our insurance carrier and our national trial counsel, Mr. Myers, assigning him the task of defending us. He, in turn, immediately contacted Mr. Mattern to act as co-counsel with him on our behalf. All was done with the approval of our insurance carrier. We attempted to locate the truck through a builder and customer who allegedly had built the truck for Mr. Churnock, i.e. Voyton Brothers Truck Body Manufacturing Company. We were unsuccessful. On information and belief, our insurance carrier contacted Mr. Anzalone as in-

structed in his letter, and learned that we were a target defendant. We authorized, with the approval of our insurance carrier, Messrs. Myers and Mattern to file the Declaratory Judgment Complaint to have our rights litigated promptly in federal court and to, as rapidly as possible, compel discovery of the alleged defective parts before further deterioration of forensic evidence was allowed to take place.

Further deponent sayth not.

/s/ David M. Snyder
DAVID M. SNYDER

Subscribed and sworn to before me this 18th day of January, 1988.

/s/ Jacqueline L. King
(Notary Public)

My Commission Expires:
Sept. 9, 1991
[seal]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.
342 North Pershing Drive
Muncie, Indiana 47305
A Corporation organized under
the Laws of the State of Indiana,

Plaintiff

vs.

FRED CHURNOCK, A resident
of the State of Pennsylvania,
residing within the Middle
District of the State of
Pennsylvania,

Defendant

CERTIFICATE OF SERVICE

HARRY P. MATTERN, Esquire, hereby certifies that he, as counsel for Plaintiff, Muncie Power Products, Inc., has forwarded a true and correct copy of the foregoing Brief of Plaintiff, Muncie Power Products, Inc., ("Muncie") in Response to Defendant's Motion to Dismiss for Lack of Jurisdiction of the Court over the Subject Matter and for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to F.R.C.P. 12(b) (1) and (6) to the following:

William F. Anzalone, Esquire
HOURIGAN, KLUGER, SPOHRER & QUINN
700 United Penn Bank Building
Wilkes-Barre, PA 18701

by hand delivery, this 21st day of January, 1988.

FARRELL, FRANK & MATTERN

BY: /s/ Harry P. Mattern
HARRY P. MATTERN, Esquire
Attorney for Plaintiff

APPENDIX H

HOURIGAN, KLUGER, SPOHRER & QUINN
A PROFESSIONAL CORPORATION

BY: William F. Anzalone, Esq. Attorney for Defendant

IDENTIFICATION NO. 25681

LAW OFFICES
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UNITED PENN BANK BUILDING
WILKES-BARRE, PENNA. 18701
(717) 825-9401

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A Corporation organized under the
Laws of the State of Indiana

Plaintiff

vs.

FRED CHURNOCK,
A resident of the State of
Pennsylvania, residing within
the Middle District of the State
of Pennsylvania,

Defendant

JUDGE EDWIN M. KOSIK

REPLY BRIEF OF DEFENDANT, FRED CHURNOCK, TO PLAINTIFF'S RESPONSE TO DEFENDANT, FRED CHURNOCK'S, MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

I. STATEMENT OF PROCEDURAL HISTORY

The Plaintiff, Muncie Power Products, Inc., upon receiving a letter of notice dated October 30, 1987, indicating that it may be named as a Defendant in a prospective personal injury claim arising from an accident involving an individual, namely, Fred Churnock, filed a declaratory judgment action on or about December 10, 1987, in the United States District Court for the Middle District of Pennsylvania. Thereafter, the Plaintiff in the prospective personal injury action, Fred Churnock, who is now the Defendant in the instant declaratory judgment action, filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and For Failure to State a Claim Upon Which Relief can be Granted on December 29, 1987. Subsequently, the Plaintiff in the instant action, Muncie Power Products, Inc., filed its response on January 21, 1988 to the Defendant, Fred Churnock's, Motion to Dismiss.

II. LAW AND ARGUMENT

A. A Declaratory Judgment Action, 28 U.S.C.A. Section 2201, Was Not Intended To Enable A Defendant To A Prospective Negligence Action To Obtain A Declaration Of Non-Liability.

28 U.S.C.A. Section 2201, which provides for the creation of a remedy in federal courts entitled "Declaratory Judgment", sets forth in pertinent part that:

> "... any court of the United States, upon the filing of an appropriate pleading, may declare the

> rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C.A. Section 2201.

It is well established that declaratory relief is discretionary. *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 494, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942). However, while declaratory relief is clearly within the discretion of the Court, there is no absolute right to a declaratory judgment in the federal courts. *Hanes Corp. v. Mallard*, 531 F.2d 585, 591 (D.C. Cir. 1976). Moreover, and of great significance to the instant Complaint for Declaratory Judgment, a declaratory judgment action was not intended to enable a defendant to a prospective negligence action to obtain a declaration of non-liability. *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165, 1169 (7th Cir. 1969); *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046, 1049 (D. Ariz. 1981); *Frito-Lay, Inc. v. Dent*, 373 F. Supp. 771, 773-774 (N.D. Miss. 1974); *State Steamship Co. v. Featherstone*, 240 F. Supp. 830, 832-833 (E.D. Pa. 1965), citing *Sun Oil Co. v. Transcontinental Gas Pipeline Co.*, 108 F. Supp. 280 (E.D. Pa. 1952), *aff'd* 203 F.2d 957 (3rd Cir.); *Sun Oil Co. v. Transcontinental Gas Pipeline Co.*, 108 F. Supp. 280, 282-283 (E.D. Pa. 1952), *aff'd* 203 F.2d 957 (3rd. Cir.). To allow a declaratory judgment action to facilitate this purpose would serve to substitute and subsequently jeopardize the traditional procedures for adjudicating negligence cases provided to injured parties. *Cunningham Brothers*, 407 F.2d at p. 1168.

The individual facts of those cases which set forth the legal proposition that the declaratory judgment action was not intended to enable a defendant to a prospective negligence action to obtain a declaration of non-liability closely

parallel the declaratory judgment action in the instant case filed on behalf of the Plaintiff, Muncie Power Products, Inc. Specifically, in *Cunningham Brothers*, a declaratory judgment action was brought by an alleged tortfeasor/contractor against a subcontractor and its employees, declaring that it did not have responsibility for the work being performed by the contractor's employees at the job site at the time they were injured. Also, the contractor sought to declare that the employees had no cause of action against the alleged tortfeasor/contractor, and that the subcontractor would be liable to indemnify the alleged tortfeasor/contractor in the event judgment was recovered against the tortfeasor/contractor. Both the United States District Court and the Court of Appeals dismissed the declaratory judgment action on the grounds that neither of the three purposes set forth by the alleged tortfeasor/contractor were those intended to be remedied by a declaratory judgment.

In addition to *Cunningham Brothers*, factually similar cases have also affirmed the above-stated legal proposition. *UNC Resources, Inc.*, *supra* (owner of uranium mill and tailings pond was unsuccessful in attempting to enjoin several Navajo Indians from pursuing in the Navajo Tribal Court claims against the owner, arising out of the failure of the containment structure, which resulted in radioactive waste flowing through a river onto the Navajo reservation); *Frito-Lay, Inc.*, *supra* (owner of truck involved in collision on highway and operated by its agent was unsuccessful in seeking a declaration that owner was not liable to the persons sustaining injury in the accident or, in the alternative, that the claims of all injured parties be consolidated for trial); *States Steamship Co.*, *supra* (district court, in its discretion, refused to exercise jurisdiction in declaratory judgment action by ship owner attempting to declare ship owner's non-liability to seamen who had engaged in a fight and who might sue the ship owner); *Sun Oil Co.*, *supra* (operator of fleet of ships was unsuccessful

in seeking declaratory relief as to its liability for injury to pipeline of defendant).

Although a declaratory judgment remedy was not intended to enable a defendant to a prospective negligence action to obtain a declaration of non-liability, a declaration of non-liability may be declared in appropriate cases. *Cunningham Brothers, supra*, at p. 1168, n. 2, citing *State Farm Mutual Auto Insurance Company v. Mossy*, 195 F.2d 56 (7th Cir. 1952). However, an appropriate case is one which arises solely within the law of liability insurance. *Maryland Casualty Co. v. Hubbard*, 22 F. Supp. 697, 699 (S.D. Cal. 1938), citing *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937). See *State Farm Mutual Auto Insurance Co. v. Mossy, supra*, at p. 58, citing *Maryland Casualty Co. v. Hubbard, supra*. The principal function of a declaratory judgment action has been held to be namely that of "construction and interpretation of written instruments (including contracts, insurance policies, statutes, ordinances, wills and trusts). . . ." *States Steamship Co, supra*, 240 F. Supp. at p. 833. Additionally, it has been recognized that one of the primary purposes of the Declaratory Judgment Act was "to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit after damage had accrued." *Cunningham Brothers, supra*, 407 F.2d at pp. 1167-1168. See *Hanes Corp., supra*, 531 F.2d at p. 592 ("this is of course only one way in which the declaratory judgment serves its more general purpose of 'avoid[ing] accrual of avoidable damages to one not certain of his rights'.")

The legal proposition that a declaration of non-liability is only appropriate in terms of liability insurance, is further supported by the case law authority, including authorities cited by counsel for Plaintiff, Muncie Power Products, in its responsive Brief. More specifically, counsel for the Plaintiff in the instant action cites in its response the case

of *Keene Corp. v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1644 (1982). The critical line of inquiry in *Keene Corp.* involved the interpretation of an insurance contract, namely, the manufacturer of thermal insulation products containing asbestos sought a declaratory judgment of the rights and obligations of the parties under comprehensive general liability policies issued to the manufacturer with respect to the manufacturer's liability for asbestos-related diseases. In light of the above-stated proposition of law rendering the declaratory judgment action appropriate in cases involving the interpretation of liability insurance, in addition to the case law authorities which support this proposition, there is much to be said for the fact that a declaratory judgment is only designed to resolve issues concerning the interpretation and construction of written instruments, namely, contracts, insurance policies, statutes, ordinances, wills, and trusts. See *States Steamship Co., supra*, 240 F. Supp. at p. 833; *Cunningham Brothers, supra*, 407 F.2d at p. 1169 (contractual duty of insurer to defend triggers declaratory relief—absent contractual duty, controversy remains too speculative due to uncertainty as to liability of tortfeasor).

Further support for the proposition of law that a declaratory judgment action is not designed to enable a defendant to a prospective negligence action to obtain a declaration of non-liability may be found in the case of *Hanes Corp. v. Millard, supra.* The *Hanes Corp.* case is perhaps the best case for identifying the particular purpose and intent for the declaratory relief. Specifically, in *Hanes Corp.*, the assignee of a United States patent brought suit for declaratory judgment as to the scope and validity of the patent and for an additional determination that royalty claims of assignors who were French citizens were barred by the statute of limitations. In relevant portions of its opinion, the United States Court of Appeals for the D.C. Circuit specifically declared that:

> "The purpose of granting declaratory relief to one potentially liable for infringement is to allow him to know in advance whether he may legally pursue a particular course of conduct. The commercial or manufacturing activity he proposes may be of substantial benefit to society, yet it may have to be abandoned if it must be carried out at the risk of liability for patent infringement. Indeed, it was part of the purpose of the Declaratory Judgment Act to prevent patent owners from suppressing competition by threatening infringement without ever actually bringing the suits that would put their patents to the test. . .This is, of course, only one way in which a declaratory judgment serves it more general purpose of 'avoid[ing] accrual of avoidable damages to one not certain of his rights'."

Hanes Corp., supra, 531 F.2d at p. 592. Ultimately, the D.C. Circuit Court went on to decline jurisdiction over the declaratory judgment action and went on to hold:

> "The anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the court house. Footnote 5."

Hanes Corp., supra, 531 F.2d at pp. 592-593. Finally, in making its ruling, the D.C. Circuit made explicit mention and reference to the *Cunningham Brothers* case. *Hanes Corp., supra*, 531 F.2d at p. 593, n. 5 (" 'To compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tortfeasor would be a perversion of the Declaratory Judgment Act,' which was not intended 'to enable a prospective negligence action defendant to obtain a declaration of non-liability'.") The instant Complaint for Declaratory Judgment filed on behalf of the Plaintiff, Muncie Power Products, Inc., clearly

falls within the general proposition of law which states that declaratory relief was not intended to enable a defendant to a prospective negligence action to obtain a declaration of non-liability. The instant declaratory judgment action stems from an accident which occurred on February 15, 1986. On this particular date, the Defendant in the instant action, Fred Churnock, sustained serious and severe disfiguring personal injuries. The violent personal injuries sustained and suffered by Fred Churnock on February 15, 1986, were attributed to a power take-off, which has been identified as one manufactured by the Plaintiff in the instant action, Muncie Power Products, Inc. Therefore, the underlying facts which give rise to the instant Complaint for declaratory judgment are clearly those which support a prospective negligence and/or products liability claim of Fred Churnock.

Counsel for Fred Churnock does not proceed with the issue of whether a letter of notice constitutes an actual justiciable controversy but, rather, directs the attention of the Court to the fact that declaratory relief is inappropriate where the underlying facts give rise to a prospective personal injury claim. Additionally, counsel for Plaintiff, Muncie Power Products, Inc., has no where in its response set forth any authority which specifically finds that declaratory relief is appropriate where the underlying facts giving rise to the declaratory judgment action also support a claim of negligence and/or products liability. Instead, those cases, in addition to the ones cited by counsel for Defendant in this Reply Brief, fully support the fact that declaratory relief is only appropriate where the issue deals with the interpretation of a liability insurance contract. This view is well-supported by the proposition of law which declares that a defendant to a prospective negligence action may not utilize declaratory relief in order to obtain a declaration of non-liability.

B. The Defendant, Fred Churnock, Presents Valid Grounds Enabling the Federal District Court, in its Discretion, to Render Declaratory Judgment Inappropriate and Subsequently Enter an Order Dismissing the Instant Complaint for Declaratory Judgment Filed on Behalf of Plaintiff, Muncie Power Products, Inc.

It is true that a federal court's determination as to whether to grant declaratory judgment is largely a matter of judicial discretion. *Brillhart, supra; Cunningham Brothers, supra*, 407 F.2d at 1169, n.3. Specifically, the fact that a federal district court has discretion to make the final determination enables it to grant declaratory relief in those cases in which the interest of justice or convenience to the parties permit. *Sun Oil Co., supra*, 108 F. Supp. at p. 283. However, it is the position of the Defendant, Fred Churnock, that in addition to falling within the general proposition of law which renders a declaratory judgment action inappropriate to a defendant in a prospective negligence action, that the interests of justice, as well as the convenience of the parties in the instant case, both require an Order dismissing the instant Complaint for Declaratory Judgment. See *Cunningham Brothers, supra*, 407 F.2d at p. 1169 ("... In these circumstances we hold that the interests of justice would not be served by entertaining a declaratory judgment action at this time.") More specifically, the Defendant, Fred Churnock, is prepared to set forth numerous grounds supporting his position, namely:

> (1) That, the Federal District Court at the present time does not have sufficient information which would enable it to make an accurate and proper determination as to whether Muncie Power Products is liable either under a negligence or products liability claim;
>
> (2) That, aside from the Federal District Court, no party or non-party has sufficient information as to whether Muncie Power Products is liable

for the injuries sustained by Fred Churnock, including Fred Churnock, Muncie Power Products, and Voyton Brothers;

(3) That, in order to answer both (1) and (2), and in accordance with the true spirit and intent of the Federal Rules of Civil Procedure, discovery should be permitted;

(4) That, declaratory relief afforded to Muncie Power Products at the present time would serve to jeopardize the preservation of the statute of limitations, which is of great necessity to the Defendant, Fred Churnock, with respect to his potential personal injury claim;

(5) That, Muncie Power Products would still be afforded the opportunity to present a complete defense to the personal injury claim of Fred Churnock;;

(6) That, Muncie Power Products may be declared a Third-Party Defendant and/or indispensable party to the potential personal injury claim maintained by Fred Churnock, thereby rendering the presence of Muncie Power Products essential to the potential claim in accordance with Rules 13 and 19(a), 19(b) of the Federal Rules of Civil Procedure; and

(7) That, both the interests of justice and convenience of the parties require that Muncie Power Products be named a Defendant to the personal injury claim of Fred Churnock initially and released only upon an accurate, proper and timely determination that Muncie Power Products is not liable in fact for the personal injuries sustained by Fred Churnock.

Therefore, in light of the seven grounds set forth above, the Defendant, Fred Churnock, respectfully submits that

dismissal of the instant declaratory judgment action is both within the interest of justice, as well as the convenience of the parties.

III. CONCLUSION

WHEREFORE, the Defendant in the instant action, Fred Churnock, respectfully requests this Honorable Court to enter an Order dismissing the Complaint for Declaratory Judgment filed on behalf of the Plaintiff, Muncie Power Products, Inc.

Respectfully submitted,

HOURIGAN, KLUGER, SPOHRER
& QUINN, P.C.

By: /s/ Wm. F. Anzalone
WILLIAM F. ANZALONE, ESQUIRE
Attorney for Defendant,
Fred Churnock

CERTIFICATE OF SERVICE

I, WILLIAM F. ANZALONE, ESQUIRE, counsel for Defendant, do hereby certify that I forwarded a true and correct copy of the foregoing Reply Brief of Defendant, Fred Churnock, in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim upon Which Relief Can Be Granted to Harry P. Mattern, Esquire, 1021 United Penn Bank Building, Wilkes-Barre, Pa., 18701, by hand delivery this 29th day of January, 1988.

/s/ WILLIAM F. ANZALONE
WILLIAM F. ANZALONE, ESQUIRE
Attorney for Defendant

APPENDIX I

HOURIGAN, KLUGER, SPOHRER & QUINN
A PROFESSIONAL CORPORATION

BY: William F. Anzalone, Esq. Attorney for Defendant

IDENTIFICATION NO. 25681

LAW OFFICES
SUITE SEVEN HUNDRED
UNITED PENN BANK BUILDING
WILKES-BARRE, PENNA. 18701
(717) 825-9401

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A Corporation organized under
the Laws of the State of Indiana

Plaintiff

vs.

FRED CHURNOCK,
A resident of the State of Pennsylvania, residing within the Middle District of the State of Pennsylvania,

Defendant

JUDGE EDWIN M. KOSIK

MOTION OF DEFENDANT, FRED CHURNOCK, FOR PROTECTIVE ORDER PURSUANT TO RULE 26(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

NOW, comes the Defendant, Fred Churnock, by and through his counsel, William F. Anzalone, Esquire, and enters the following Motion for Protective Order Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and sets forth the following reasons therefore:

1. That the Plaintiff, Muncie Power Products, Inc., upon receiving a letter of notice dated October 30, 1987, indicating that it may be named as a Defendant in a prospective personal injury claim arising from an accident on or about February 15, 1986, involving an individual, namely, Fred Churnock, filed a Complaint for Declaratory Judgment on or about December 10, 1987, in the United States District Court for the Middle District of Pennsylvania.

2. That the Plaintiff in the prospective personal injury action, Fred Churnock, who is now the Defendant in the instant Declaratory Judgment action, filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief May Be Granted on December 29, 1987.

3. That in connection with the personal injuries suffered and sustained by Fred Churnock on or about February 15, 1986, counsel for Fred Churnock has since filed a Praecipe of Summons dated February 3, 1988, which names as Defendants both Voyton Brothers Truck Body Manufacturing Company and Muncie Power Products, Inc. Kindly make reference to the Praecipe of Summons, attached and incorporated herein as Exhibit "A".

4. That while service has not yet been effectuated, it will be done so and within the procedural time limits.

5. That one of the named Defendants in the Praecipe for Summons, Muncie Power Products, Inc., is the named Plaintiff in the Declaratory Judgment action filed on or about December 10, 1987, in the United States District Court for the Middle District of Pennsylvania.

6. That the named Plaintiff in the Complaint for Declaratory Judgment, Muncie Power Products, Inc., has requested from Fred Churnock the production of specific items, namely: (a) the truck alleged to have been involved in the alleged accident; (b) the power take-off device; (c) the controls for the power take-off device; (d) the shaft running to the power take-off device; (e) the hydraulic pump; and, (f) controls for the hydraulic pump and all other parts alleged to be involved in the accident.

7. That to allow production of the items sought at this time would impose undue burden and expense upon Fred Churnock of having to produce the same items at a later time and in connection with the personal injury claim of Fred Churnock already instituted and filed by Fred Churnock in Luzerne County on February 3, 1988. Kindly make reference to Praecipe for Summons, attached and incorporated herein as Exhibit "A".

8. That to allow production of the items sought at this time would be oppressive and extremely prejudicial to the Defendant, Voyton Brothers Truck Body Manufacturing Company, who although not a party to the Complaint for Declaratory Judgment, is a named Defendant to the personal injury claim of Fred Churnock filed on February 3, 1988, and so to produce the items sought at this time would surely create the risk to the Defendant, Voyton Brothers Truck Body Manufacturing Company, that the requested items may be damaged and/or altered if subject to production at this time.

9. That in order to avoid placing undue burden and expense on the Declaratory Judgment Defendant, Fred Churnock, as well as to eliminate oppression and prejudice

to the named Defendant of the underlying personal injury claim of Fred Churnock, Voyton Brothers Truck Body Manufacturing Company, the Honorable Court may order to permit discovery of the items sought at a later time and place.

10. For the foregoing reasons, the Declaratory Judgment Defendant, Fred Churnock, would request that the Court issue a protective order precluding the Declaratory Judgment Plaintiff, Muncie Power Products, Inc., from inspecting, testing, examining, and/or photographing the items listed in its Request for Production.

WHEREFORE, Defendant, Fred Churnock, respectfully requests this Honorable Court to issue a Protective Order precluding the Plaintiff, Muncie Power Products, Inc., from obtaining the items listed in its Request for Production.

HOURIGAN, KLUGER, SPOHRER
& QUINN, P.C.

BY: /s/ WILLIAM F. ANZALONE
WILLIAM F. ANZALONE,
ESQUIRE
Attorney for Defendant

EXHIBIT A

In the Court of Common Pleas
of Luzerne County

No. 516-C

FREDERICK CHURNOCK,

Plaintiff

vs.

VOYTON BROTHERS TRUCK BODY
MANUFACTURING CO. and
MUNCIE POWER PRODUCTS, INC.

Defendants

FILED 88 FEB-3
To EUGENE E. DUFFY
Prothonotary:

Issue summons in Civil Action - Law in the above entitled case.

Returnable sec. leg.

Wilkes-Barre, Pa.,
Feb. 3, 1988

/s/Wm. F. Anzalone
Attorney for Plaintiff
William F. Anzalone, Esquire

CERTIFICATE OF SERVICE

I, WILLIAM F. ANZALONE, ESQUIRE, do hereby certify that I forwarded a true and correct copy of the foregoing Motion of Defendant for Protective Order and Order upon Harry P. Mattern, Esquire, 1021 United Pen Bank Building, Wilkes-Barre, Pa., 18701, by hand delivery, this 12th day of February, 1988.

/s/ WILLIAM F. ANZALONE
WILLIAM F. ANZALONE, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A Corporation organized under the Laws of the State of Indiana

Plaintiff

vs.

FRED CHURNOCK,
A resident of the State of Pennsylvania, residing within the Middle District of the State of Pennsylvania,

Defendant

JUDGE EDWIN M. KOSIK

ORDER

AND NOW, this day of , 1988, upon consideration of the attached Motion for Protective Order, it is hereby ordered that the Plaintiff, Muncie Power Products, Inc., is precluded, for the purposes of its Complaint for Declaratory Judgment, from inspecting, testing, examining, and/or photographing the items listed in its Rule 34 production request, namely: (a) the truck alleged to have been involved in the alleged accident; (b) the power take-off device; (c) the controls for the power take-off device; (d) the shaft running to the power take-off device; (e) the hydraulic pump; and, (f) controls for the hydraulic pump

and all other parts alleged to be involved in the accident.

BY THE COURT:

/s/ _____

J.

HOURIGAN, KLUGER, SPOHRER & QUINN
A PROFESSIONAL CORPORATION

BY: William F. Anzalone, Esq. Attorney for Defendant

IDENTIFICATION NO. 25681

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IN THE UNITED STATES DISTRICT COURT
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CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.,
342 North Pershing Drive
Muncie, Indiana 47302
A Corporation organized under the Laws of the State of Indiana

Plaintiff

vs.

FRED CHURNOCK,
A resident of the State of Pennsylvania, residing within the Middle District of the State of Pennsylvania,

Defendant

RECEIVED FEB 28 1988

JUDGE EDWIN M. KOSIK

BRIEF IN SUPPORT OF MOTION OF DEFENDANT, FRED CHURNOCK, FOR PROTECTIVE ORDER PURSUANT TO RULE 26(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

I. BRIEF STATEMENT OF HISTORY OF CASE

Upon receiving a letter of notice dated October 30, 1987, indicating that it may be named as a Defendant in a prospective personal injury claim arising from an accident involving an individual, namely, Fred Churnock, Muncie Power Products, Inc., the Plaintiff herein, filed a Complaint for Declaratory Judgment on or about December 10, 1987, in the United States District Court for the Middle District of Pennsylvania. Thereafter, Fred Churnock, the prospective Plaintiff to a personal injury claim and now the Defendant of the instant Declaratory Judgment action, filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief May Be Granted on December 29, 1987.

Pursuant to the personal injuries suffered and sustained by Fred Churnock on or about February 15, 1986, which was conveyed to Muncie Power Products, Inc., in the letter of notice dated October 30, 1987, counsel for Fred Churnock has in fact filed a Praecipe of Summons dated February 3, 1988, which names as Defendants both Voyton Brothers Truck Body Manufacturing Company and Muncie Power Products, Inc. The named Defendant in the Praecipe for Summons, Muncie Power Products, Inc., is the Plaintiff in the instant Complaint for Declaratory Judgment filed on or about December 10, 1987. In connection with its Complaint for Declaratory Judgment, and prior to the institution of suit by Fred Churnock on February 3, 1988, Muncie Power Products, Inc., has filed on January

14, 1988, a Rule 34 request for production of items from Fred Churnock.

II. BRIEF STATEMENT OF FACTS

On or about February 15, 1986, Fred Churnock sustained serious and severe disfiguring personal injuries in the nature of an amputation of an arm. The violent personal injuries sustained and suffered by Fred Churnock on February 15, 1986, were attributed to a power take-off which has been identified as one manufactured by Muncie Power Products, Inc., and later sold to and used by Voyton Brothers Truck Body Manufacturing Company. In connection with the above-described personal injuries, Fred Churnock has instituted suit in Luzerne County by way of Praecipe of Summons dated February 3, 1988, naming both Muncie Power Products, Inc., and Voyton Brothers Truck Body Manufacturing Company as Defendants.

III. QUESTION PRESENTED

WHERE A RULE 26(c) PROTECTIVE ORDER SHOULD BE GRANTED WHERE A DECLARATORY JUDGMENT PLAINTIFF REQUESTS THE PRODUCTION OF ITEMS WHICH IF PRODUCED WOULD RESULT IN UNDUE BURDEN AND EXPENSE TO THE PERSONAL INJURY PLAINTIFF AND OPPRESSION AND MATERIAL PREJUDICE TO OTHER DEFENDANTS TO THE UNDERLYING PERSONAL INJURY CLAIM?

(Answered in the affirmative by the Defendant, Fred Churnock).

A. Applicable Law Governing Motions For Protective Orders

A Motion for Protective Order is governed by Rule 26(c) of the Federal Rules of Civil Procedure. Fed. Rules Civ. Proc. 26(c), 28 U.S.C.A. In order to protect a party or person from "annoyance, embarrassment, oppression, or

undue burden or expense", and for "good cause" shown, a party by motion may seek a protective order seeking, but not necessarily limited to, "that the discovery not be had" or "that the discovery may be had only on specified terms and conditions, including a designation of the time or place". Fed. Rules Civ. Proc. 26(c), 28 U.S.C.A.

B. The Protective Order Sought By The Declaratory Judgment Defendant, Fred Churnock, Is Appropriate To Preclude The Declaratory Judgment Plaintiff, Muncie Power Products, Inc., From Production Of The Various Items Listed In Its Production Request, For Said Protective Order Would Safeguard Against Any Undue Burden And Expense Imposed Upon Fred Churnock Of Having To Produce The Items More Than Once, As Well As Avoiding Oppression And Prejudice To Voyton Brothers Truck Body Manufacturing Company, Which Is An Actual And Named Defendant To The Underlying Personal Injury Claim Of Fred Churnock.

The Motion for Protective Order of Declaratory Judgment Defendant, Fred Churnock, is appropriate for two specific reasons. First, to allow production of the items sought by Muncie Power Products at the present time would impose undue burden and expense upon Fred Churnock of having to produce the same items at a later time and in connection with the personal injury claim of Fred Churnock already instituted and filed in Luzerne County on February 3, 1988, by way of Praecipe for Summons. *See* Motion of Defendant, Fred Churnock, for Protective Order, Exhibit "A". Second, to allow production of the items sought at this time would be oppressive and extremely prejudicial to a named Defendant to the underlying personal injury claim of Fred Churnock, namely, Voyton Brothers Truck Body Manufacturing Company. Since Voyton Brothers Truck Manufacturing Company is in fact a party Defendant to the personal injury claim of Fred Churnock filed on February 3, 1988, to produce the items sought

at this time would surely create the risk of damage and/or alteration of said items. This risk is highly oppressive and prejudicial to the personal injury Defendant, Voyton Brothers Truck Body Manufacturing Company.

The Advisory Committee Notes to Rule 26(c) of the Federal Rules of Civil Procedure clearly illustrate so as to avoid confusion that a Protective Order positively extends to "time" as well as to "place". Advisory Committee Notes to Fed. Rules Civ. Proc. Rule 26(c), 28 U.S.C.A. The Advisory Committee Notes to Rule 26(c) also set forth with certainty that a Protective Order is without question designed to safeguard against "undue burden or expense." *Id.* In light of the above-mentioned Advisory Committee Notes, as well as the potential undue burden and expense on Fred Churnock and the potential oppression and prejudice to Voyton Brothers Truck Manufacturing Company, counsel for Declaratory Judgment Defendant, Fred Churnock, respectfully submit that the instant Motion for Protective Order is an appropriate one. It is the position of Fred Churnock that since the production of the items requested by Muncie Power Products, Inc., would impose undue burden and expense upon Fred Churnock and oppression and prejudice to Voyton Brothers Truck Body Manufacturing Company, the Protective Order sought by Fred Churnock should be granted so as to preclude the production request at the present time. Ultimately, it is well within the discretion of the Court to order the production of said items at a later time, a "time" which is consistent with the traditional pattern of discovery in personal injury actions and also one that imposes no undue burden and expense and no oppression nor prejudice.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Declaratory Judgment Defendant, Fred Churnock, respectfully requests the Honorable Court to issue a Protective Order precluding Declaratory Judgment Plaintiff, Muncie Power

Products, Inc., from inspecting, testing, examining, and/or photographing the items listed in its Request for Production at the present time.

HOURIGAN, KLUGER, SPOHRER
& QUINN

BY: /s/ WILLIAM F. ANZALONE
WILLIAM F. ANZALONE, ESQUIRE
Attorney for Defendant

CERTIFICATE OF SERVICE

I, WILLIAM F. ANZALONE, ESQUIRE, do hereby certify that I forwarded a true and correct copy of the foregoing Brief in Support of Motion of Defendant for Protective Order upon Harry P. Mattern, Esquire, 1021 United Penn Bank Building, Wilkes-Barre, Pa., 18701, by hand delivery, this 12th day of February, 1988.

/s/ WILLIAM F. ANZALONE
WILLIAM F. ANZALONE, ESQUIRE

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.
1342 North Pershing Drive
Muncie, Indiana 47305
A Corporation organized under the Laws of the State of Indiana,

Plaintiff

vs.

FRED CHURNOCK, A resident of the State of Pennsylvania, residing within the Middle District of the State of Pennsylvania,

Defendant

BRIEF OF PLAINTIFF, MUNCIE POWER PRODUCTS, INC., IN OPPOSITION TO DEFENDANT, FRED CHURNOCK'S MOTION FOR A PROTECTIVE ORDER PURSUANT TO RULE 26(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiff, Muncie Power Products, Inc. (hereinafter "Muncie"), responds to Defendant's ("Churnock's") Motion for a Protective Order by requesting that it be denied for the following reasons:

I. BRIEF HISTORY OF THE CASE

On or about October 30, 1987, William F. Anzalone, Esquire, in his capacity as counsel for Fred Churnock, directed a letter to Muncie Power Products, Inc., threat-

ening Muncie with a lawsuit for personal injuries alleged to have been sustained by Fred Churnock.

Muncie then filed its Declaratory Judgment action to obtain speedy access to the evidence to prevent its loss and to invoke its right as an out of state litigant to seek impartial justice in a federal court. It was recognized by Muncie that it is essential to promptly inspect the alleged accident parts to prevent possible loss of important forensic evidence. Reference is made to the Snyder Affidavit which was previously attached to the Brief of Muncie in response to defendant's Motion to Dismiss and is also attached to this Brief. To accomplish the important aim of quickly inspecting the accident parts, a Rule 34 request for production of items and things was served on Churnock's counsel on January 14, 1988. This request for production was limited to those essential items and things which would have a bearing on ascertaining the rights and liabilities of Muncie Power Products, Inc. It was furthermore designed to allow as convenient as possible production of the items and things as it requested production at the residence of Muncie's counsel in Kingston, Pennsylvania, which is barely two miles from the office of Churnock's counsel or, in the alternative, in some other mutually convenient place.

Even though the rights of Muncie are being affirmatively affected by the passage of time and the unknown factors which maybe affecting the accident parts, and even though the purpose of the Declaratory Judgment action was to obtain the salutory benefit of inspecting the parts pursuant to Rule 34, this request has been met with the delay of a Motion for a Protective Order.

II. BRIEF STATEMENT OF FACTS

The facts relating to Churnock's alleged injury as well as the alleged involvement by Muncie Power Products, Inc. have been related to counsel in conversation and in past documents filed with this Honorable Court. The details of

the alleged accident, the identity of the parts alleged to have been involved in the accident, and the forensics involved in the alleged accident all remain within the control of Churnock. Churnock has now filed a Motion for a Protective Order to prohibit Muncie from gaining access to this information until an undetermined date in the future.

III. QUESTIONS PRESENTED

Should a Rule 26(c) Protective Order be granted where there is no undue burden and expense to the personal injury plaintiff, no oppression and material prejudice to other defendants and, to the contrary, an oppression and material prejudice to the personal injury defendant?

The movant has provided the Court with two "reasons" to grant his Motion for a Protective Order. Reason one is an unspecified, undocumented assertion of an undue burden and expense upon Churnock which is connected with an allegation that he would have to produce the same items at a later time in connection with a belatedly filed action in the Court of Common Pleas of Luzerne County. The second reason proffered is a claim that such production would be oppressive and prejudicial to Voyton Brothers Truck Body Manufacturing Company as to produce the items now would create a risk of damage and/or alteration of said items. These two arguments are addressed seriatim.

1. The request for production filed by the plaintiff requested, in essence, the accident parts which have been alleged by Churnock to have caused his severe injury. Muncie has not requested anything esoteric or designed to cause hardship-rather Muncie has requested only those things which could easily be provided by Churnock and which are deemed by Muncie to be essential to timely inspect. The place for production of these items was 235 Sahara Drive, Kingston, Pennsylvania, which is plaintiff's counsel's home. This location is less than two miles from Churnock's counsel's office. As an alternative, a place of

inspection would be such other place or location as is mutually agreeable by the parties.

Certainly the discovery requested is not useless or vexatious. It is not designed to annoy, embarrass or oppress the defendant. It does not cause an expense for the defendant aside from that of driving the truck a short distance or providing a site for inspection. Since inspection is an inevitability in the course of this lawsuit, the inspection at this time is neither unduly burdensome or unduly expensive for Churnock.

Churnock has filed a belated lawsuit in the Court of Common Pleas of Luzerne County. He need not have done this insofar as he could have proceeded within this instant lawsuit rather than countering the plaintiff's complaint with a Motion to Dismiss. He has therefore created his own burden or expense by filing the second lawsuit.

As this Brief is written, Muncie has not yet been served with Churnock's Writ of Summons. Once this is accomplished, a Motion to Dismiss will be filed with the Court of Common Pleas of Luzerne County thereby eliminating any of Churnock's fears that he will have to produce the items again. This belated filing of a state court action, after the matter has been properly joined in a federal court action, does not create a grounds for obtaining a protective order.

Even if Churnock had to produce the accident parts on two occasions, it is submitted that this is not unduly burdensome or expensive. The place of inspection was convenient for Churnock and the expense minimal. If the injuries alleged to have been sustained by Fred Churnock are as "serious" as depicted by his counsel, multiple inspections should not be looked upon as prohibitive.

Furthermore, Muncie Power Products, Inc. is not without rights to be protected. An affidavit has been filed by David Snyder outlining very real concerns as to the delay

which has already taken place and the further delay which is now taking place before inspection has been allowed. He has outlined his concerns as to the removal, confusion or destruction of important forensic evidence. Presumably Churnock has had the opportunity and exercised the opportunity to inspect, test and examine the accident parts prior to writing such a threatening letter to Muncie Power Products, Inc. Through the passage of time and the delay engendered by this Motion for a Protective Order, Muncie is being deprived the same opportunity which has always been available to Churnock.

Rule 26(c) requires "good cause" be shown for a protective order to be issued. The burden is upon the movant to show the necessity for its inssuance, which contemplates a particular and specific demonstration of fact, as distinguished from stereotyped and conclusive restatement; such determination must also include a consideration of relative hardship to the nonmoving party should the protective order be granted. *General Dynamics Corp. v. Selb Manufacturing Co., 481 Fed. 2d 1204, 1212 (8th Cir., 1973)*, Cert. denied *414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116*. It is submitted that in the exercise of its discretion, this Honorable Court should take into consideration the very real concerns as to the loss of forensic evidence attested to by Muncie and that this should outweigh the unspecified, minimal claim or burden suggested by Churnock. This is especially so insofar as Churnock has created the suggestion of burden by the filing of his belated State action.

2. Churnock has also suggested some danger or risk of damage or alteration of the items and has raised the spector of some prejudice to Voyton Brothers Truck Body Manufacturing Company. Muncie has no reason or intention to create an oppressive or prejudicial situation for Voyton. Certainly Churnock does not mean to suggest that Muncie does not have the right to test and inspect the accident parts. Recognizing that Muncie has this right, and, fur-

thermore, recognizing the dissipation of Muncie's rights through the passage of time, it is submitted that Muncie should be allowed to promptly inspect the accident parts. If it is so oppressive and prejudicial for Muncie to exercise its right to inspect and test, how much more oppressive and prejudicial to Muncie is the continued retention of the items within the exclusive control of Churnock. It is submitted that if Churnock has a good faith concern about the damage or alteration of said items, he should make his concerns known in a constructive fashion which would allow counsel and the parties to devise methods to allay these concerns.

It should be furthermore noted that, rather than disputing the instant lawsuit, Churnock could have joined Voyton as a defendant long ago and may still do so which would have allowed Churnock to have coordinated inspection measures. Having not availed himself of this opportunity and having delayed inspection to the deteriment of Muncie Power Products through his Motion to Dismiss and through this Motion for a Protective Order, still more delay should not be countenanced by this Court.

IV. CONCLUSION

It is submitted that the Motion for a Protective Order filed by Fred Churnock should be denied. There is a compelling need for immediate expert access to the alleged accident parts pursuant to Rule 34 F.R.C.P. Failure to obtain such access will result in serious deprivation of due process of law to Muncie. Furthermore, the delay which has been engendered by Churnock through his filing of dilatory motions should not be rewarded or countenanced by still more delay particularly when the need for inspection is so compelling. Churnock has not given the Court any reasons substantiating burden, expense, oppression or prejudice which would outweigh the need for inspection by Muncie. Therefore, Churnock's Motion for a Protective Order should be denied.

Respectfully submitted,

/s/ H. P. MATTERN, Esquire
HARRY P. MATTERN, Esquire
Attorney for Muncie Power Products, Inc.
1021 United Penn Bank Building
Wilkes-Barre, PA 18701
(717) 822-5643

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. CV-87-1735

MUNCIE POWER PRODUCTS, INC.
342 North Pershing Drive
Muncie, Indiana 47302
A corporation organized under the Laws of the State of Indiana

Plaintiff,

vs.

FRED CHURNOCK
A resident of the State of Pennsylvania, residing within the Middle District of the State of Pennsylvania

Defendant.

AFFIDAVIT OF DAVID M. SNYDER

STATE OF INDIANA
SS.
COUNTY OF DELAWARE)

I, David M. Snyder, being duly sworn, depose and state that:

1. I have been employed continuously by Plaintiff "Muncie" since 1966, serving in the capacity, for at least the last 15 years, as Vice President of Engineering when just recently I became Corporate Vice President.

2. Muncie is a small, closely held corporation whose corporate offices are located in Muncie, Indiana. It is an

Indiana corporation. Muncie maintains small distribution centers, none of which are located in the State of Pennsylvania. Muncie recently purchased from Sperry Vickers its share of a joint venture operation in Oklahoma, which produces a new and patented power takeoff device designed by Sperry Vickers personnel. Muncie does not reside in or have an established place of business in the State of Pennsylvania.

3. I have a B.S.M.E. degree in mechanical engineering from Purdue University in 1963 and a Master's Degree in Business from Ball State University in 1974. I have also audited graduate courses in the fluid power field at the Milwaukee School of Engineering, University of Wisconsin.

4. In my more than 20 years experience at Muncie, I have become very familiar with Muncie's products, including those distributed for other manufacturers by Muncie, such as Dana power takeoff devices, often mistakenly believed by laymen to be Muncie's. I have also become very familiar with the various applications of power takeoff devices, how they are used, and the potentials for misuse, abuse, misinstallation, and wear out, all of which are beyond Muncie's control because Muncie does not install power takeoffs.

5. I am further aware of numerous instances where our power takeoffs are coupled, by others, to controls and shafts of other manufacturers not affiliated with Muncie and over whom Muncie has no control.

6. In recent years, Muncie has been selling a power takeoff device designed by Sperry Vickers personnel. We have been unable to ascertain whether the power takeoff device allegedly involved in Mr. Churnock's accident is actually a Dana device, distributed by Dana or Muncie, or one designed by Sperry Vickers and sold by Muncie, or whether it was some else's. Inspection is necessary to ascertain this fact.

7. From the description of the accident given to Muncie's representatives by Mr. Churnock's counsel, it is believed that Mr. Churnock may have been having trouble either with the power takeoff, the dump pump, or some other component on a dump truck which he owned. Leaving the engine running, he crawled under the truck, reached up to the power takeoff, dump pump, or some other component, when his coatsleeve allegedly caught in some component, severely injuring his arm. What actually happened can not be ascertained to any reasonable degree of certainty without inspection of the truck in a reasonably unaltered condition.

8. In order to have any chance to ascertain the true reason Mr. Churnock crawled under the truck with the engine running, it is imperative that an investigation be undertaken as soon as possible. Dump trucks are used in rugged environments, are subject to heavy weathering and corrosion, all of which can remove, confuse, or destroy important forensic evidence which would prove the true "cause" of the problem. The longer one must wait, the greater the potential for lost evidence in this particular technology.

9. On November 5, 1987 Muncie received a letter from William F. Anzalone, attorney for Mr. Churnock, threatening suit against Muncie and advising us to contact our insurance carrier. We took this letter, attached as Ex. A to Muncie's Complaint, as a definite threat of litigation (i.e. "suit"). We immediately contacted our insurance carrier and our national trial counsel, Mr. Myers, assigning him the task of defending us. He, in turn, immediately contacted Mr. Mattern to act as co-counsel with him on our behalf. All was done with the approval of our insurance carrier. We attempted to locate the truck through a builder and customer who allegedly had built the truck for Mr. Churnock, i.e. Voyton Brothers Truck Body Manufacturing Company. We were unsuccessful. On information and belief, our insurance carrier contacted Mr. Anzalone as in-

structed in his letter, and learned that we were a target defendant. We authorized, with the approval of our insurance carrier, Messrs. Myers and Mattern to file the Declaratory Judgment Complaint to have our rights litigated promptly in a federal court and to, as rapidly as possible, compel discovery of the alleged defective parts before further deterioration of forensic evidence was allowed to take place.

Further deponent sayth not.

/s/DAVID M. SNYDER
DAVID M. SNYDER

Subscribed and sworn to before me this 18th day of January, 1988.

/s/ Jacqueline L. King
(Notary Public)

My Commission Expires: Sept. 9, 1991

[Seal]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-87-1735

MUNCIE POWER PRODUCTS, INC.
342 North Pershing Drive
Muncie, Indiana 47305
A Corporation organized under the Laws of the State of Indiana,

Plaintiff

vs.

FRED CHURNOCK, A resident of the State of Pennsylvania, residing within the Middle District of the State of Pennsylvania,

Defendant

CERTIFICATE OF SERVICE

HARRY P. MATTERN, Esquire, hereby certifies that he, as counsel for Muncie Power Products, Inc., has forwarded a true and correct copy of the foregoing Brief of Plaintiff, Muncie Power Products, Inc., In Opposition To Defendant, Fred Churnock's Motion For A Protective Order Pursuant To Rule 26(c) Of The Federal Rules Of Civil Procedure to the following:

William F. Anzalone, Esquire
HOURIGAN, KLUGER, SPOHRER & QUINN
700 United Penn Bank Building
Wilkes-Barre, PA 18701

by hand delivery this 25th day of February, 1988.

FARRELL, FRANK & MATTERN

BY: /s/H. P. MATTERN
HARRY P. MATTERN, Esquire
Attorney for Plaintiff

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 87-1735
(Judge Kosik)

MUNCIE POWER PRODUCTS, INC.
Plaintiff

vs.

FRED CHURNOCK,
Defendant

FILED MAR 24 1988

NOTICE OF APPEAL

Notice is hereby given that MUNCIE POWER PRODUCTS, INC., Plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order Dismissing the Plaintiff's Complaint entered in this action on the 26th day of February, 1988.

/s/ Harry P. Mattern
HARRY P. MATTERN, Esquire
Attorney for MUNCIE POWER PRODUCTS, INC.
1021 United Penn Bank Building
Wilkes-Barre, PA 18701
ID # 21415
(717) 822-5643

APPENDIX L

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

CIVIL ACTION—LAW
JURY TRIAL DEMANDED
NO. 516-C of 1988

FREDERICK CHURNOCK,

Plaintiff

vs.

CLEM VOYTON and CHARLES VOYTON,
t/d/b/a VOYTON BROTHERS TRUCK
BODY MANUFACTURING CO., and
MUNCIE POWER PRODUCTS, INC.,

Defendants

FILED 88 AUG 15

NOTICE

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LEGAL SERVICES OF NORTHEASTERN
PENNA., INC.
410 Bicentennial Bldg.
15 Public Square
Wilkes-Barre, PA 18701
(717) 825-8567

-or-

145 East Broad St.
Room 108
Hazleton, PA 18201
(717) 455-9512

LACKAWANNA COUNTY LEGAL AID &
DEFENDER ASSOCIATION
Suite 200, Scranton Electric Building
Linden Street
Scranton, PA 18503
(717) 342-0184

HOURIGAN, KLUGER, SPOHRER & QUINN
A PROFESSIONAL CORPORATION

By: William F. Anzalone, Esq. ATTORNEY FOR Plaintiff

IDENTIFICATION NO. 25681

LAW OFFICES
SUITE SEVEN HUNDRED
UNITED PENN BANK BUILDING
WILKES-BARRE, PENNA. 18701
(717) 825-9401

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

CIVIL ACTION—LAW

JURY TRIAL DEMANDED

No. 516-C of 1988

FREDERICK CHURNOCK,

Plaintiff

vs.

CLEM VOYTON and CHARLES VOYTON,
t/d/b/a VOYTON BROTHERS TRUCK
BODY MANUFACTURING CO., and
MUNCIE POWER PRODUCTS, INC.,

Defendants

COMPLAINT

The Plaintiff, FREDERICK CHURNOCK, by and through his counsel, Hourigan, Kluger, Spohrer & Quinn, P.C., hereby complains against the above-named

Defendants as follows, reserving the right to amend his Complaint in accordance with Rules of Civil Procedure based on matters disclosed by discovery:

1. The Plaintiff, FREDERICK CHURNOCK, is an adult individual who currently resides at 818 West Taylor Street, Taylor, Lackawanna County, Pennsylvania.

2. The Defendants, CLEM VOYTON and CHARLES VOYTON, t/d/b/a VOYTON BROTHERS TRUCK BODY MANUFACTURING CO., hereinafter referred to as "VOYTON" is a truck body manufacturing company with its principal place of business located at 62 Parrish Street, Wilkes-Barre, Pennsylvania.

3. The Defendant, MUNCIE POWER PRODUCTS, INC., hereinafter referred to as "MUNCIE" is an Indiana Corporation, with its principal place of business located at 342 North Pershing Drive, Muncie, Indiana.

4. That on or about March 19, 1985, the Plaintiff, FREDERICK CHURNOCK, took to the Defendant, VOYTON, a 1976 International Chasis for the purposes of having a dump body from another truck attached to it.

5. That the Defendant, VOYTON, transferred the dump body onto the 1976 International Chasis, and as a part of the transfer, installed a power take-off unit, manufactured by the Defendant, MUNCIE, said power take-off being identification number 1G6S-U6715-03BX, said unit being a TG series PTO.

6. That the Plaintiff paid for the installation for the transfer of the said dump body and the purchase of the power take-off unit an amount of One Thousand Fifty Seven ($1,057.00) Dollars to the Defendant, VOYTON.

7. That on February 15, 1986, at approximately 9:40 A.M., the Plaintiff was operating the said 1976 Chasis, with the dump body attached, by the Defendant, VOYTON, and the power take-off unit manufactured by the

Defendant, MUNCIE, when the power take-off unit would not engage, so as to allow the dump body when the power take-off was activated, to be raised.

8. That the said Plaintiff had operated the said power take-off unit, since the date of purchase on or about March 19, 1985 until February 15, 1986, without ever experiencing a failure of the power take-off unit, that is without ever experiencing the dump body not elevating after the power take-off unit was engaged.

9. That prior to February 15, 1986, the Plaintiff had never gone under the body of his 1976 International Chasis to examine, inspect or perform mechanical repairs of any kind upon the power take-off unit, nor had he ever done so on previous dump trucks that he had owned and operated before the purchase of the power take-off manufactured by the Defendant, MUNCIE, and distributed and installed by the Defendant, VOYTON, on or about March 19, 1985.

10. That on February 15, 1986, at approximately 9:40 A.M., when the power take-off manufactured by the Defendant, MUNCIE, would not raise the dump body of his truck, the Plaintiff, with the engine running and his vehicle in neutral, removed himself from the cab of the dump truck, and went under the body of the Chasis to discover why the power take-off unit would not raise the dump body, and observed that the clamp which holds the power take-off cable, at the linkage had become loosened, and while attempting to move the lever with his left hand, caused the drive shaft to turn, grabbing the sleeve of his left shirt and thereafter causing his left arm and his shirt to become entangled in a drive shaft producing serious, permanent personal injuries to the Plaintiff as hereinafter more fully described.

11. That as a result of the carelessness, recklessness, and negligence of the Defendant, VOYTON, and the Defendant, MUNCIE, and as a result of the manufacture

and distribution of the power take-off unit manufactured by the Defendant, MUNCIE, and distributed by the Defendant, VOYTON, which said unit was defective and as a further result of the breach of implied warranties and express warranties, which the Defendant, MUNCIE, and the Defendant, VOYTON, extended to the Plaintiff, the said Plaintiff, FREDERICK CHURNOCK, suffered the following severe, painful, disabling and disfiguring and permanent injuries:

a. Crush Injury Left Forearm;

b. Fracture of Ribs 3 through 7 on the Left Side;

c. Nasal Fracture;

d. Amputation of Left Forearm;

e. Severe Emotional Distress and Anxiety;

f. Sleeplessness;

g. Loss of Weight.

12. That as a further result of the aforesaid injuries, the Plaintiff, FREDERICK CHURNOCK, was rendered sick, sore, and disabled and sustained severe physical and mental pain, suffering great discomfort, and the usual residual disabilities associated with the above-described injuries, all of which have disabled him and have required medical care, surgery and treatment, and the Plaintiff is informed, believes, and therefore avers that his injuries, suffering, pain, discomfort, inconvenience and disabilities are of a continuing and permanent nature.

13. That as a further result of the aforesaid injuries, the Plaintiff, FREDERICK CHURNOCK, is suffering physical and mental pain, suffering emotional distress and discomfort and inconvenience and the Plaintiff is informed, believes and therefore avers that he will continue to suffer in the future, thereby requiring additional medical treatment and care from time to time.

14. The following medical expenses represent in part the expenses incurred for treatment of the aforesaid injuries:

a. Thomas Jefferson University Hospital 2/15/86 - 2/24/86	$14,423.05
b. Community Medical Center 2/15/86	2,324.98
c. Avoca Ambulance Assoc. 2/15/86	175.00
d. Michael K. Lim, M.D. 2/15/86	125.00
3/3/86	75.00
e. Aero Medix 2/15/86	2,033.00
f. Moses Taylor Hospital 3/8/86	7,821.61
6/11/86	38.00
g. Jefferson Associates in Radiology 2/16/86 - 2/19/86	408.00
h. University Surgical Services 2/15/86	200.00
i. Sandy Furey, M.D. and John Diakiw, M.D.	155.00
j. Thomas Jefferson Anex. Group 2/15/86	525.00
2/17/86	455.00
k. Edward K. Chung, M.D.	160.00
l. Scranton Artificial Limb Company	6,500.00
m. Eric Blomain, M.D.	800.00
TOTAL	$36,218.64

15. That at the time the incident that occurred on February 15, 1986, the Plaintiff was employed as an over the road truck driver with the Tose Fowler, Inc., Scranton, Pennsylvania, where his rate of pay was $13.22 per hour.

16. That as a result of the injuries that the Plaintiff has sustained, the Plaintiff has suffered a total loss of his earnings and impairment of his earning capacity and power which said loss is permanent.

17. That as a further result of the aforesaid injuries, the Plaintiff has sustained and will continue to sustain a loss of the everyday pleasures and enjoyments of life and such loss is permanent.

COUNT I

Frederick Churnock vs. Clem Voyton and Charles Voyton t/d/b/a Voyton Brothers Truck Body Manufacturing Co.

18. The Plaintiff, FREDERICK CHURNOCK, incorporates herein by reference, Paragraphs 1 through 17, inclusive, as though the same were herein set forth at length.

19. That the carelessness, recklessness and negligence of the Defendant, VOYTON, at all times material hereto, consisted of the following:

a. In then and there failing to provide the Plaintiff with the owner's manual for the MUNCIE power take-off unit which it installed on the Plaintiff's truck on or about March 19, 1985;

b. IN then and there failing to verbally inform the Plaintiff after installing the power take-off unit manufactured by the Defendant, MUNCIE, that the Plaintiff was not to go underneath the vehicle with the engine running;

c. In then and there failing to verbally inform the Plaintiff after installing the power take-off unit manufactured by the Defendant, MUNCIE, on the Plaintiff's truck, not to attempt to work on the installed power take-off unit with the engine running;

d. In then and there failing to post safety labels on the sun visor of the Plaintiff's truck, on the power take-off control, and on the vehicle frame rails in a position highly visible to the Plaintiff if he were to attempt to go under the truck near the power take-off unit, which said warning labels would state:

CAUTION

TO PREVENT POSSIBLE INJURY OR DEATH *DO NOT* GO UNDERNEATH THE VEHICLE WITH THE ENGINE RUNNING. *DO NOT* WORK NEAR A ROTATING DRIVE SHAFT TO PREVENT GETTING CAUGHT OR ENTANGLED.
DO NOT ATTEMPT TO OPERATE THE CONTROLS OF THE POWER TAKE-OFF OR OTHER DRIVEN EQUIPMENT FROM UNDERNEATH THE VEHICLE WITH THE ENGINE RUNNING.
DO NOT OPERATE THE CONTROLS OF THE POWER TAKE-OFF OR OTHER DRIVEN EQUIPMENT IN ANY POSITION THAT COULD RESULT IN GETTING CAUGHT IN THE MOVING MACHINERY.
DO NOT ATTEMPT TO WORK ON AN INSTALLED POWER TAKE-OFF WITH THE ENGINE RUNNING.

e. IN then and there failing to provide the Plaintiff's vehicle with a warning label to be applied near the power take-off control, which said warning label would state:

CAUTION

This vehicle is equipped with a *POWER TAKE-OFF*. Shut engine off before working on POWER TAKE-OFF or getting below ve-

hicle. Consult operating instructions before using power take-off.

f. In then and there failing to properly install the power take-off manufactured by the Defendant, MUNCIE, so as to cause the clamp which holds the power take-off cable at the linkage to become loosened, thereby resulting in a failure of the power take-off;

g. In then and there failing to install a guard between the power take-off and the drive shaft of the Plaintiff's 1976 International Tractor, so as to prevent the Plaintiff from having his arm or clothing entangled in the drive shaft while working on the power take-off unit, with the engine of the vehicle running;

h. In then and there otherwise failing to exercise reasonable care and caution in the installation of the power take-off unit manufactured by the Defendant, MUNCIE, and instructing the Plaintiff on its use.

WHEREFORE, the Plaintiff, FREDERICK CHURNOCK, claims of the Defendants, CLEM VOYTON and CHARLES VOYTON t/d/b/a VOYTON BROTHERS TRUCK BODY MANUFACTURING CO., an amount in excess of Twenty Thousand ($20,000.00) Dollars, which sum is in excess of the sum requiring compulsory arbitration of the applicable statutes of the Commonwealth of Pennsylvania, local Rules of Court, plus other damages permitted by law and costs.

FIRST CAUSE OF ACTION

COUNT II

STRICT LIABILITY

Frederick Churnock vs. Clem Voyton and Charles Voyton t/d/b/a Voyton Brothers Truck Body Manufacturing Co.

20. The Plaintiff, FREDERICK CHURNOCK, incorporates herein by reference as fully as though the same were herein set forth at length Paragraphs 1 through 17, and 18 through 19(h), inclusive, of the Plaintiff's Complaint.

21. That the Defendant, VOYTON, was engaged in the manufacturing, distribution and sale of power take-off units manufactured by the Defendant, MUNCIE.

22. That the Defendant, VOYTON, distributed and sold a power take-off unit, manufactured by Defendant, MUNCIE, model TG, bearing identification number 1G6S-U6715-03BX, which said power take-off was installed by Defendant, VOYTON, on a truck owned by Plaintiff, FRED CHURNOCK, on or about March 19, 1985.

23. That the power take-off was sold to the Plaintiff in a defective condition, as that defect is more specifically set forth in Paragraph 19(a) through (h).

24. That the power take-off when received by the Plaintiff, FRED CHURNOCK, was without substantial change in the condition in which it was originally manufactured and sold;

25. That on February 15, 1986 while the Plaintiff was using the said power take-off unit, for the purpose and the manner for which it was originally manufactured and sold, the Plaintiff received serious and permanent personal injuries, as a result of a defect in the power take-off unit, said defect being a failure of the Defendant, VOYTON, to adhere appropriate warning labels to the body of Plaintiff's truck, as more specifically set forth in Paragraph 19 (d)

and (E) of the Plaintiff's Complaint and further said defect being the nature of the power take-off unit failing to be equipped with an appropriate safety guard as set forth in paragraph 19(g) of the Plaintiff's Complaint.

26. That the Plaintiff, FREDERICK CHURNOCK, was unaware of the aforesaid defects at all times material hereto.

WHEREFORE, the Plaintiff, FREDERICK CHURNOCK, claims of the Defendants, CLEM VOYTON and CHARLES VOYTON t/d/b/a VOYTON BROTHERS TRUCK BODY MANUFACTURING CO., an amount in excess of Twenty Thousand ($20,000.00) Dollars, which sum is in excess of the sum requiring compulsory arbitration of the applicable statutes of the Commonwealth of Pennsylvania, the local Rules of Court, plus other damages permitted by law and cost.

FIRST CAUSE OF ACTION

COUNT III

WARRANTY

Frederick Churnock vs. Clem Voyton and Charles Voyton t/d/b/a Voyton Brothers Truck Body Manufacturing Co.

27. That the Plaintiff, FREDERICK CHURNOCK, incorporates herein by reference as fully as though the same were herein set forth at length, Paragraphs 1 through 17, Paragraphs 18 through 19(h) and Paragraphs 20 through 26 inclusive, of Plaintiff's Complaint.

28. That the Defendant, VOYTON, distributed for sale a power take-off unit manufactured by Defendant, MUNCIE, model TG, bearing identification number 1G6S-U6715-03BX, said power take-off sold to the Plaintiff, FREDERICK CHURNOCK, and installed by the Defendant, VOYTON, on a dump body truck on or about March 19, 1985.

29. The the Plaintiff relied on the skill and judgment of VOYTON on the said power take-off as installed and without warnings, was suitable and safe for use.

30. That the said Defendant, VOYTON, distributed the power take-off unit on the market for sale to the Plaintiff, with knowledge that the Plaintiff would use the power take-off on his dump truck for the purposes of raising or lowing the dump body.

31. That the Defendant, VOYTON, impliedly warranted to the Plaintiff, that the said power take-off unit was safe, merchantable, and fit for use as a power take-off unit, to raise and lower the dump body of the Plaintiff's truck.

32. That the said Defendant, VOYTON, breached the warranties to the Plaintiff since the same power take-off unit was not safe, merchantable, nor fit for the purposes for which it was intended to be used by reason of the defect set forth in Paragraph 19 of the Plaintiff's Complaint.

33. That the Plaintiff, FREDERICK CHURNOCK, relied on the warranties made by the Defendant, VOYTON, and that the personal injuries and damages which the Plaintiff, FREDERICK CHURNOCK, sustained, as set forth in Paragraph 11 are the direct result of said breach of warranty.

WHEREFORE, the Plaintiff, FREDERICK CHURNOCK, claims of the Defendants, CLEM VOYTON and CHARLES VOYTON t/d/b/a VOYTON BROTHERS TRUCK BODY MANUFACTURING CO., an amount in excess of Twenty Thousand ($20,000.00) Dollars, which sum is in excess of the sum requiring compulsory arbitration of the applicable statutes of the Commonwealth of Pennsylvania, local Rules of Court, plus other damages permitted by law and costs.

FIRST CAUSE OF ACTION

COUNT IV

NEGLIGENCE

Frederick Churnock vs. Muncie Power Products, Inc.

34. The Plaintiff, FREDERICK CHURNOCK, incorporates herein by reference, Paragraphs 1 through 17, Paragraphs 18 through 19(h), Paragraphs 20 through 26, and Paragraphs 26 through 30, inclusive, hereof.

35. That the carelessness, recklessness and negligence of the Defendant, MUNCIE, at all times material hereto, consisted of the following:

a. In then and there manufacturing a power take-off unit which it knew would create a high risk of injury or death to the Plaintiff if the Plaintiff were to go underneath his vehicle with the engine running, work on or maintain the power take-off unit, without attaching to the unit, a warning safety label or providing to the installer of said unit, warning safety labels to be attached to the sun visor, the power take-off unit, the vehicle frame rails (one on each side) in a position that would be highly visible to anyone that would go under the truck near the power take-off rotating shaft which would say:

CAUTION

TO PREVENT POSSIBLE INJURY OR DEATH *DO NOT* GO UNDERNEATH THE VEHICLE WITH THE ENGINE RUNNING. *DO NOT* WORK NEAR A ROTATING DRIVE SHAFT TO PREVENT GETTING CAUGHT OR ENTANGLED. *DO NOT* ATTEMPT TO OPERATE THE CONTROLS OF THE POWER TAKE-OFF OR OTHER DRI-

VEN EQUIPMENT FROM UNDERNEATH THE VEHICLE WITH THE ENGINE RUNNING.
DO NOT OPERATE THE CONTROLS OF THE POWER TAKE-OFF OR OTHER DRIVEN EQUIPMENT IN ANY POSITION THAT COULD RESULT IN GETTING CAUGHT IN THE MOVING MACHINERY.
DO NOT ATTEMPT TO WORK ON AN INSTALLED POWER TAKE-OFF WITH THE ENGINE RUNNING.

b. In then and there failing to identify purchasers of power take-off units manufactured by MUNCIE and installed by another so as to forward to said purchaser a warning safety decal kit to be placed on the sun visor of the vehicle on the power take-off control and on the frame rails of the vehicle as well as onto the unit, setting forth warning language identified in subparagraph (a);

c. In then and there failing to provide VOYTON with warning safety decals to be placed on the sun visor of the vehicle on which the power take-off unit was installed, to be placed onto the power take-off control, and onto the frame rails, containing language as identified in subparagraph (a), so that VOYTON may affix the same in the appropriate places upon installation of the power take-off;

d. In then and there failing to provide VOYTON, or the Plaintiff, with an owner's manual with the power take-off unit that was purchased from VOYTON, which would set forth the warnings more specifically identified in subparagraph (a);

e. In then and there failing to attach a guard to the power take-off unit which would prevent an individual attempting to maintain or work upon the power take-off unit with the engine of the vehicle running, from having his clothing or arm entangled in a rotating drive shaft;

f. In then and there failing to exercise that amount of care and caution that a manufacturer of a power take-off unit which it knew or should have known created a high risk of danger of injury to the vehicle operator attempting to work on or maintain the power take-off unit with the engine of the vehicle running should exercise.

WHEREFORE, the Plaintiff, FREDERICK CHURNOCK, claims of the Defendant, MUNCIE POWER PRODUCTS, INC., an amount in excess of Twenty Thousand ($20,000.00) Dollars which sum is in excess of the sum requiring compulsory arbitration of the applicable statutes of the Commonwealth of Pennsylvania, local Rules of Court, plus other damages permitted by law and costs.

FIRST CAUSE OF ACTION

COURT V

Frederick Churnock vs. Muncie Power Products, Inc.

36. The Plaintiff, FREDERICK CHURNOCK, incorporates herein by reference as fully as though the same were herein set forth at length Paragraphs 1 through 17, Paragraphs 18 through 19(h), Paragraphs 20 through 26, Paragraphs 27 through 33, Paragraphs 34 through 35, inclusive, hereof.

37. That the Defendant, MUNCIE, was a seller engaged in the business of selling power take-off units.

38. That the Defendant, MUNCIE, manufactured and sold a power take-off unit, model number TG series PTO, bearing identification number 1G6S-U6715-03BX.

39. That Defendant, VOYTON, a distributor of such products and thereafter said power take-off unit, was purchased by Frederick Churnock, Plaintiff herein, on or about March 19, 1985.

40. That the power take-off unit, identified in the aforementioned paragraph reached the Plaintiff, Frederick Churnock, as a consumer, without substantial change in the condition in which it was originally sold.

41. That the Defendant, MUNCIE, sold to the Defendant, VOYTON, the power take-off unit identified in paragraph 38, in a defective condition in that said power take-off unit did not contain adequate warnings as to the possible risk and inherent dangers of its product, more specifically, did not contain warnings that the Plaintiff was not to go under his truck with the engine running to maintain or work upon the power take-off unit as more specifically set forth in paragraph 35(a) of the Plaintiff's Complaint, and further was defective in that it did not contain a guard so as to prevent the Plaintiff from having his arm or clothing entangled in the rotating drive shaft when he attempted to work upon or maintain the power take-off unit, with the engine running of his motor vehicle, as more specifically set forth in paragraph 35(f) of Plaintiff's Complaint.

42. That the Plaintiff was not aware that he was not to go under his vehicle for the purposes of maintaining or working upon the power take-off unit, with the engine of his vehicle running.

43. That on February 15, 1986, while the Plaintiff was using his dump truck, the power take-off unit manufactured and installed by the Defendant, VOYTON, he received serious personal and permanent injuries as a result

of the defect in the power take-off unit as more specifically set forth in paragraph 35(a) through (f) of the Plaintiff's Complaint.

WHEREFORE, the Plaintiff, FREDERICK CHURNOCK, claims of the Defendant, MUNCIE POWER PRODUCTS, INC., an amount in excess of Twenty Thousand ($20,000.00) Dollars which sum is in excess of the sum requiring compulsory arbitration of the applicable statutes of the Commonwealth of Pennsylvania, local Rules of Court, plus other damages permitted by law and costs.

FIRST CAUSE OF ACTION

COUNT VI

WARRANTY

Frederick Churnock vs. Muncie Power Products, Inc.

44. The Plaintiff, FREDERICK CHURNOCK, incorporates herein by reference as fully as though the same were herein set forth at length Paragraphs 1 through 17, Paragraphs 18 through 19(h), Paragraphs 20 through 26, Paragraphs 27 through 33, Paragraphs 34 through 35, Paragraphs 36 through 43, inclusive hereof.

45. That the said power take-off unit sold to the Plaintiff was manufactured by the Defendant, MUNCIE, who at the time of said manufacture was a merchant.

46. That the Plaintiff purchased the said power take-off unit from the Defendant, VOYTON, a distributor of the MUNCIE power take-off unit for the purposes of raising and lowering a dump body attached to his 1976 International Truck Chasis.

47. That the Defendant, MUNCIE, manufactured and placed on the market for sale to the Plaintiff, the said power take-off unit with knowledge for which it was intended to be used and further expressly and impliedly warranted to the Plaintiff and the general public that the power take-off unit was safe, merchantable, and fit for the use for which it was intended, namely the raising and lowering of dumped bodies attached to truck chasis.

48. That the Defendant, MUNCIE, breached its warranty to the Plaintiff because the power take-off unit was not safe, merchantable, nor fit for ordinary purposes for which it was intended to be used, namely the raising and lowering of the dump body attached to the Plaintiff's truck chasis.

49. That the Plaintiff relied on the warranties made by the Defendant, MUNCIE, for the damages which the

Plaintiff sustained as set forth in Paragraph 11, where the direct result of breach of warranties.

WHEREFORE, the Plaintiff, FREDERICK CHURNOCK, claims of the Defendant, MUNCIE POWER PRODUCTS, INC., an amount in excess of Twenty Thousand ($20,000.00) Dollars which sum is in excess of the sum requiring compulsory arbitration of the applicable statutes of the Commonwealth of Pennsylvania, local Rules of Court, plus other damages permitted by law and costs.

SECOND CAUSE OF ACTION

COUNT I

Punitive Damages

Frederick Churnock vs. Clem Voyton and Charles Voyton t/d/b/a Voyton Brothers Truck Body Manufacturing Co.

50. The Plaintiff, FREDERICK CHURNOCK, incorporates herein by reference as fully as though the same were herein set forth at length, Paragraphs 1 through 17, Paragraphs 18 through 19(h), Paragraphs 20 through 26, Paragraphs 27 through 33, Paragraphs 34 through 35, Paragraphs 36 through 43, Paragraphs 44 through 49, inclusive, of Plaintiff's Complaint.

51. That the conduct of the Defendant, VOYTON, as more particularly set forth in Paragraph 19(a)-(h) of Plaintiff's Complaint, inclusive, constituted a wanton and reckless disregard for the safety of the Plaintiff and further constituted conscious disregard for the high probability of risk of serious harm which would be incurred to the Plaintiff by going under his motor vehicle with the engine running to maintain or work upon the power take-off unit.

WHEREFORE, the plaintiff, FREDERICK CHURNOCK, demands that punitive damages be assessed against the Defendants, CLEM VOYTON and CHARLES VOY-

TON t/d/b/a VOYTON BROTHERS TRUCK BODY MANUFACTURING CO.

SECOND CAUSE OF ACTION

COUNT I

PUNITIVE DAMAGES

Frederick Churnock vs. Muncie Power Products, Inc.

52. The Plaintiff, FREDERICK CHURNOCK, incorporates herein by reference as fully as though the same were herein set forth at length, Paragraphs 1 through 17, Paragraphs 18 through 19(h), Paragraphs 20 through 26, Paragraphs 27 through 33, Paragraphs 34 through 35, Paragraphs 36 through 43, Paragraphs 44 through 49, Paragraphs 50 through 51, inclusive of the Plaintiff's Complaint.

53. That the conduct of the Defendant, MUNCIE, as more particularly set forth in paragraphs 35(a) through (f) inclusive, constituted a wanton and reckless disregard for the safety of the Plaintiff, and further constituted a conscious disregard for the high probability of risk by going under his motor vehicle to work upon or maintain the power take-off unit with the engine running.

WHEREFORE, the Plaintiff, FREDERICK CHURNOCK, demands that punitive damages be assessed against the Defendant, MUNCIE.

HOURIGAN, KLUGER, SPOHRER
& QUINN, P.C.

By: /s/ Wm. F. Anzalone
WILLIAM F. ANZALONE, ESQUIRE
Attorney for Plaintiff

VERIFICATION

I, FREDERICK CHURNOCK, Plaintiff herein, do hereby certify that the statements contained in the foregoing Complaint are true and correct and are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

/s/ Frederick Churnock
FREDERICK CHURNOCK

CERTIFICATE OF SERVICE

WILLIAM F. ANZALONE, ESQUIRE, hereby certifies that he, as counsel for Plaintiff, has forwarded a true and correct copy of the foregoing Complaint to the following:

Muncie Power Products, Inc.
342 North Pershing Drive
Muncie, Indiana

Clem Voyton and Charles Voyton
t/d/b/a VOYTON BROTHERS TRUCK BODY MANUFACTURING CO.
62 Parrish Street
Wilkes-Barre, PA

by certified mail/return receipt requested, this 15th day of August, 1988.

HOURIGAN, KLUGER, SPOHRER & QUINN, P.C.

/s/ William F. Anzalone
William F. Anzalone, Esquire
Attorney for Plaintiff